No. 1315

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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1944.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor.

THE COMMONWEALTH OF MASSACHUSETTS,
THE CITY OF BOSTON,
WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,
THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,

Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

THE COMMONWEALTH OF MASSACHUSETTS,
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THE CITY OF BOSTON,
By HENRY E. FOLEY, *Special Assistant Corporation Counsel*,
WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,
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OCTOBER TERM, 1944.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR.

THE COMMONWEALTH OF MASSACHUSETTS,
THE CITY OF BOSTON,
WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE,
THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,
Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, ET ALS.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, the Commonwealth of Massachusetts, the City of Boston, Webster and Atlas National Bank of

Boston, Trustee (said Bank being the duly appointed successor of Old Colony Trust Company, of Boston, as Trustee under the Indenture dated July 29, 1896, under which the now outstanding first mortgage bonds of The Boston Terminal Company were issued), and The Mutual Savings Bank Group Committee for Boston Terminal Company Bonds respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on January 30, 1945, in the form of an order for mandate pursuant to an opinion rendered January 2, 1945, as modified by an opinion rendered January 23, 1945, reversing in part and affirming in part an order of the District Court of the United States for the District of Connecticut approving a plan of reorganization of the New York, New Haven and Hartford Railroad Company, debtor, and secondary debtors, under section 77 of the Bankruptcy Act (11 U.S.C. sec. 205).

Opinions Below.

The opinions of the District Court are reported in 54 F. Supp. 595, and 54 F. Supp. 631. The opinions of the Circuit Court of Appeals are reported in 147 F. (2d) 40.

Jurisdiction.

The Circuit Court of Appeals entered its order for mandate on January 30, 1945, pursuant to an opinion rendered January 2, 1945, as modified by an opinion rendered January 23, 1945 (R. p. 11525). Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U.S.C. sec. 347 (a)), and section 24 (c) of the Bankruptcy Act (11 U.S.C. sec. 47(c)).

Statute Involved.

The statute involved is section 77 of the Bankruptcy Act (11 U.S.C. sec. 205).

Statement of the Matter Involved.

The Old Colony Railroad Company (hereinafter called the Old Colony) was incorporated by the Commonwealth of Massachusetts by chapter 143 of the Acts of 1872 as a consolidation of previously existing Massachusetts railroad corporations. The Boston & Providence Railroad Corporation (hereinafter called the Providence) was incorporated by the Commonwealth of Massachusetts by chapter 56 of the Acts of 1831. The New England Railroad Company (hereinafter called the New England) was incorporated by the Commonwealth of Massachusetts by chapter 484 of the Acts of 1895 to exercise the franchise granted to a preceding Massachusetts corporation. The Boston & Albany Railroad Company (hereinafter called the Albany) was incorporated by the Commonwealth of Massachusetts by chapter 270 of the Acts of 1867, which consolidated existing Massachusetts corporations. The New York, New Haven & Hartford Railroad Company (hereinafter called the New Haven) was incorporated by the Commonwealth of Massachusetts by chapter 171 of the Acts of 1872, which merged previously existing Massachusetts railroad corporations with a corporation existing under the laws of the State of Connecticut.

By instrument dated April 7, 1888, the Providence was leased to the Old Colony for a term of ninety-nine years from April 1, 1888[1] (see Mass. St. 1888, c. 42). By instrument dated February 15, 1893, the Old Colony Rail-

[1] 239 I.C.C. 337, 342; R. pp. 7875, 184.

road, including the leasehold interest in the Providence, was leased to the New Haven for a term of ninety-nine years from March 1, 1893.[2]

In 1896 the Old Colony, the Providence, the New England, and the Albany all entered Boston from the south, and terminated there. Each had a separate terminal station located at a considerable distance from those of the others, and not only did the approaching tracks cross busy city streets at grade, but also the tracks of one railroad crossed those of another at grade. These conditions[3] caused danger as well as inconvenience, not only to the public traveling on these railroads but to the public generally. To remove this evil the Commonwealth of Massachusetts passed a statute (St. 1896, c. 516, R. p. 167) which created a corporation under the name of The Boston Terminal Company to construct and maintain a union passenger station and to provide and operate adequate terminal facilities "for the accommodation of the public in connection therewith" (§ 1).

The basic purpose of the statute was to provide for the accommodation of the public (§§ 1, 6, 7, 11) with special reference to safety as well as to convenience, as the statute itself explicitly declared (§§ 6, 7). To this end final authority to determine on the plans for the union terminal in accordance with the dictates of public safety and convenience was given to the state Board of Railroad Commissioners (§§ 6, 7). The City of Boston was required on the one hand to make heavy expenditures of public money[4] in order to carry out specifically designated changes in highways and bridges (§§ 11, 13), and on the other hand

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[2] 239 I.C.C. 337, 342; R. p. 7875.

[3] They are set forth in detail in the Massachusetts Statute of 1896, referred to *infra;* R. p. 167, Appendix, p. 50.

[4] See also St. 1898, c. 248 (Mass.); St. 1899, c. 466 (Mass.).

to assess betterments flowing specially from the location and construction of the terminal (§ 14). Upon the Terminal Company was conferred not only whatever power of eminent domain was needed (§§ 5, 23) but the additional power to require another railroad and a street railway to relocate their existing tracks in public highways (§§ 15, 16).

The statute was mandatory and obligatory, not merely enabling or permissive, both as to the immediate erection of the terminal by the Terminal Company (§§ 6, 7) and as to the use of the terminal thereafter by the railroads specifically named in the statute "for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them" (§ 9). And to this end, and also with respect to all the obligations imposed by the statute, special jurisdiction was conferred upon the highest court of the Commonwealth to enforce the legislative mandate (§§ 6, 9, 10, 11, 15, 16, 19, 22).

The obligations created by the statute were not based upon privity of contract between the Terminal Company and the named railroads. On the one hand, the statute required the Terminal Company as owner[5] of the union terminal to provide terminal facilities for the named railroads (§§ 1, 9, 10, 11). On the other hand, the statute imposed upon the named railroads the obligation to use the terminal for all of their terminal passenger business in Boston (§ 9). Moreover, the statute not only directly imposed upon the named railroads the obligation to pay to the Terminal Company for the required use the amount deemed necessary by the Commonwealth for the maintenance and operation of the terminal, but itself directly fixed and prescribed the terms of payment as between the named

[5] See *Frazier* v. *New York, New Haven & Hartford Railroad*, 180 Mass. 427 (1902); *Hunt* v. *New York, New Haven & Hartford Railroad*, 212 Mass. 102 (1912).

railroads and the Terminal Company (§ 10). The payment so prescribed was "such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said Terminal Company, including insurance and all repairs, all taxes[6] and assessments which may be required to be paid by said Terminal Company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock." The statute further provided that each of the named railroads should pay for such use of the terminal and facilities "in the proportion in which it has the use thereof," and conferred upon the State Board of Railroad Commissioners special jurisdiction to make the apportionment amongst the named railroads if they failed to agree amongst themselves. And "the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses" (§ 10).

The railroads named in the statute were the Albany, the New England, the Providence, and the Old Colony, and in addition the New Haven, "being lessee of the Old Colony Railroad Company" (§ 2).

In 1898 the New England was leased to the New Haven,[7] and in 1908, under authority of chapter 252 of the Acts of 1905, the New England was merged with the New Haven. By St. 1921, c. 363, the Terminal Company statute

[6] Section 25 of the statute provides that the Terminal Company's real estate required by the act to be used by the railroad companies shall be assessed to and the taxes thereon paid by the railroad companies referred to in said section instead of the Terminal Company (R. p. 184).

[7] See Mass. St. 1898, c. 399.

was made applicable to the New York Central Railroad Company as lessee of the Albany.

In 1931, on petition of the New Haven, the Department of Public Utilities of the Commonwealth of Massachusetts (successors to the Board of Railroad Commissioners)[8] determined that the proportion of use of the terminal facilities be fixed at 70% by the New Haven and 30% by the New York Central as lessee of the Albany.[9] This determination has never been revised.

In October, 1935, proceedings for the reorganization of the New Haven under Section 77 of the Bankruptcy Act were begun in the District Court for the District of Connecticut.[10] In June, 1936, the Old Colony lease to the New Haven was rejected,[11] whereupon proceedings were begun in the same court for the reorganization of the Old Colony as a secondary debtor, and the court directed the New Haven trustees to operate the Old Colony for the account of the Old Colony estate.[12] In July, 1938, the Providence lease to the Old Colony was in turn rejected, and the court ordered the New Haven trustees to operate the Providence.[13] Proceedings for the reorganization of the Providence were begun in the District Court for the District of Massachusetts in August, 1938,[14] and are still pending.

The New Haven trustees continued to make the same statutory payments to the Boston Terminal Company which the New Haven, pursuant to the 1931 apportionment, was making at the commencement of the reorgan-

[8] The Board of Railroad Commissioners became the Public Service Commission by St. 1913, c. 784 (Mass.), and later became the Department of Public Utilities by St. 1919, c. 350 (Mass.).

[9] R. p. 199.

[10] 239 I.C.C. 337, 338; R. pp. 7870, 7871.

[11] 239 I.C.C. 337, 342; R. p. 7875.

[12] 239 I.C.C. 337, 379; R. p. 7920.

[13] 239 I.C.C. 337; R. p. 7874.

[14] 239 I.C.C. 337, 342; R. pp. 7875, 7876.

ization proceedings until October 30, 1939, when the District Court for Connecticut at the request of the New Haven trustees ordered them to suspend so much of the payment as represented 70% of the bond interest and franchise taxes of the Terminal Company.[15]

This withholding of part of the amount necessary for the payment by the Terminal Company of its franchise taxes and bond interest rendered it unable to meet its current obligations in full, and on November 3, 1939, proceedings for its reorganization were instituted in the District Court for the District of Massachusetts,[16] and are still pending.

On March 22, 1940, the Interstate Commerce Commission rendered a report and order approving a plan of reorganization for the New Haven without the inclusion of the Old Colony.[17] It authorized but did not require the acquisition of the Providence. It made no provision for

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[15] The order was reversed by the Circuit Court of Appeals. *Webster & Atlas Nat. Bank of Boston* v. *Palmer*, 111 F. (2d) 215 (1940). This Court granted certiorari, 311 U.S. 624 (1940), and reversed the decision of the Circuit Court of Appeals on the ground that the order dealt merely with an administrative matter within the discretion of the District Court, leaving open the question of ultimate liability to the Terminal Company under the Terminal Company statute. *Palmer* v. *Webster & Atlas Nat. Bank of Boston*, 312 U.S. 156, 168 (1941).

It should be noted that at the time of entry of this order the New Haven trustees, pursuant to an earlier order of the District Court, had ceased to operate trains for their own account into the terminal over the New England Division of the New Haven (formerly the New England Railroad), as pointed out on page 159 of the decision of this Court. However, that use of the terminal by the New Haven trustees was later resumed as a result of the decision by this Court in *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939), and still continues.

[16] *Boston Terminal Co.* v. *Mutual Savings Bank Group Committee*, 127 F. (2d) 707 (C.C.A. 1st, 1942).

[17] 239 I.C.C. 337; R. p. 7863.

curtailment of the obligation of any of the railroads concerned in the reorganization to render passenger service or for interference with any of the obligations imposed by the Terminal Company act. This plan of reorganization was modified by a Supplemental Report and Order dated February 18, 1941,[18] which required acquisition of the Old Colony by the New Haven and also required acquisition of the Providence if a plan of reorganization simultaneously approved by the Commission for the Providence should be approved and confirmed by the court.[19] The modified plan proposed by the Supplemental Report and Order contained a provision for curtailment by the reorganized principal debtor of passenger service on the Old Colony in certain contingencies, but contained no provision purporting to modify any of the obligations imposed by the Terminal Company statute. This plan was certified to the District Court and was followed shortly after by a Second Supplemental Report and Order dated March 25, 1941,[20] which purported to clarify a provision in the First Supplemental Report and Order not here material.

Objection to the inclusion of the Old Colony was made by certain New Haven creditors. While these and other objections were under consideration by the court, the court on its own motion, on June 3, 1941, informally appointed a committee (afterwards known as the Compromise Committee) to explore the possibility of discovering a basis upon which the acquisition of the Old Colony might be acceptable to New Haven creditors.[21] This committee consisted of four members, all of whom were expressly appointed to act in their individual and not representative capacities for the sole purpose of making recommenda-

[18] 244 I.C.C. 239; R. p. 8037.
[19] 244 I.C.C. 239, 247; R. pp. 8049, 8109, 8110.
[20] 244 I.C.C. 521; R. p. 8115.
[21] 254 I.C.C. 63, 64; R. pp. 8956-8958, 9013, 9760.

tions which were to have no binding force whatever. The committee made to the court an *ex parte* report, dated September 19, 1941, which was never publicly disclosed until attached as an appendix to the unreported opinion of the court dated December 8, 1941, disapproving the proposed plan of reorganization.[22] This report proposed the acquisition of the Old Colony by the New Haven through the instrumentality of a plan which of itself would, first, amend the charters of the New Haven and of the Old Colony so as to permit the reorganized principal debtor and the Old Colony to curtail passenger service on Old Colony lines, and, second, further amend these charters so as to reduce and limit the amount which the railroads in reorganization would be required to pay for the use required by the Boston Terminal Company statute. (It is particularly noteworthy that the report of the Compromise Committee did not propose to interfere in any way with the *obligation to use and the obligation to permit use* imposed by the Terminal Company act upon railroads and the Terminal Company, respectively.)

With respect to these proposals, the District Court, in its opinion of December 8, 1941, said:

> ". . . the report of the Compromise Committee suggests appropriate modifications of the charters of the debtor railroads whereby a ceiling is imposed upon the amounts they shall be obligated to pay to the Terminal Company. The proposal seems to recognize that the Terminal Company Act is not only a charter of the Terminal Company but also a modification of the charters of the debtor railroads. Thus authority for the charter modifications now proposed by the Committee is brought within subdivision (b) of Sec-

[22] 254 I.C.C. 63, 64, R. p. 9760. See also R. pp. 8958, 9013.

tion 77 which provides that a plan may include 'the amendment of the charter of the debtor'." [23]

Hence it is apparent that the concept of the legality of circumventing obligations imposed by Massachusetts laws in the exercise of the police power by means of a plan provision amending *ex proprio vigore* the charters of the bankrupt railroads did not originate with the Commission but was recommended to the Commission by the District Court.

The District Court, having disapproved the plan proposed by the First and Second Supplemental Reports, referred the proceedings back to the Commission,[24] which thereupon ordered the proceedings to be reopened and assigned them for public hearing on February 17, 1942.[25] This hearing was closed on February 20, 1942, at which time the Director of the Bureau of Finance of the Commission, who was presiding, ordered the record to be kept open until April 4, 1942, for the purpose of receiving further proposals from the Compromise Committee with respect to the price to be paid for the acquisition of the Old Colony by the New Haven.[26] Thereafter, on April 4, 1942, there was filed with the Commission a document entitled "Joint Report," dated April 3, 1942, signed not only by the four members of the Compromise Committee, still acting solely in their individual capacities, but also by representatives of various New Haven and Old Colony creditors. It purported to be an amplification of the Report of the Compromise Committee by the addition of a definite proposal of the price which its authors were willing to

[23] R. pp. 8959, 8960.
[24] 254 I.C.C. 63, 64; R. p. 9760.
[25] R. p. 9.
[26] R. pp. 9761, 10720, 207, 209.

recommend for the acquisition of the Old Colony by the New Haven. It expressly stated that—

> "The proposals contained in the original Report of the Compromise Committee are, with but little modification, reaffirmed in all respects by this Joint Report, and, for convenience, are incorporated in this Report even where they are not modified by it." [27]

Although the provisions of this Joint Report with respect to curtailment of passenger service on the Old Colony did not differ in any substantial degree from the proposals of the Report of the Compromise Committee, the proposed treatment of the obligations imposed by the Terminal Company statute was vitally and fundamentally different from what had been proposed in the Report of the Compromise Committee. Whereas the latter had been limited to a proposed modification of the obligation created by the Terminal Company statute to *pay* for the use of the Terminal Company facilities, without any attempt to interfere with the *use obligation* itself, the Joint Report, on the other hand, in addition to the actual provisions of the Report of the Compromise Committee, proposed also to abrogate the *obligation to use* the passenger terminal.

It is most significant to note that until the Joint Report was filed on April 4, 1942, after the close of the hearing, there had never been any suggestion from any source that the obligation prescribed by the Massachusetts Act to use the terminal could or should be nullified by a plan of reorganization through the device of the amendment of the charters of the debtor railroads or in any other manner.

On October 6, 1942, without any hearing on the proposals of the Joint Report, the Commission rendered its Third

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[27] R. pp. 209, 210.

Supplemental Report and Order [28] approving a new plan of reorganization for the debtors, which adopted *in totidem verbis* the proposals of the Joint Report providing for the amendment by the plan itself of the charters of the Old Colony and of the New Haven so as (*a*) to authorize total discontinuance of passenger service on the Old Colony lines in certain contingencies, and (*b*) to abrogate entirely the statutory obligation imposed upon the debtor railroads with respect both to the use of the union passenger terminal and to the amount to be paid for the use. This was the first time the Commission proposed by means of a plan of reorganization to relieve any of the debtor railroads from the obligation imposed upon them by the Terminal Company statute to use the union passenger terminal for all their terminal passenger business in Boston.

Various petitions for modification of the plan approved in the Third Supplemental Report and Order were filed by parties in interest, including all the present petitioners. Thereafter, without further hearing, on July 13, 1943, the Commission rendered its Fourth Supplemental Report and Order,[29] approving a plan of reorganization containing modifications not material to any issue raised by this petition.

In the Fourth Supplemental Report the Commission showed itself to be under the serious misapprehension that the provisions of the Third Supplemental Plan relative to the Terminal Company statute, which were adhered to without change in the Fourth Supplemental Plan, were based upon the proposals contained in the Report of the Compromise Committee, the legality of which had been endorsed by the District Court in its opinion of December 8, 1941, whereas, as pointed out above, the provisions of the

[28] 254 I.C.C. 63; R. p. 9753.
[29] 254 I.C.C. 405; R. p. 10123.

Joint Report differed fundamentally from those of the Report of the Compromise Committee in this respect.[30]

The Fourth Supplemental Report and Order, together with a transcript of the proceedings, was forthwith certified to the District Court.[31] Within the time fixed by the court, these petitioners and various other parties in interest filed with the court objections and claims for equitable treatment, upon which notice of a hearing was then given by the court. After hearing, the court filed on December 21, 1943,[32] an opinion in which it found and ruled that substantial provisions of the plan were illegal,[33] and in terms sustained some of the objections to the plan.[34] Nevertheless, instead of disapproving the plan, the court in its said opinion expressed the intention of entering a decree which would "correct" the plan to the extent necessary to avoid "the impact" of the many provisions found to be illegal. Under the caption "General Observations and Conclusion" the opinion stated as follows:[35]

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[30] 254 I.C.C. 405, 425. The exact language of the Fourth Supplemental Report is as follows: ". . . ; that the court discussed the terminal-company problem at length in its opinion of December 8, 1941, on the plan, and commended the report made to it by the compromise committee which proposed adjusting the obligations of the debtors to the terminal company in the same way as provided for in our report of October 6, 1942, *supra*." R. p. 10160.

[31] A report and order approving a plan of reorganization for the Providence providing that with respect to the obligations both as to use and as to payment imposed upon the Providence by the Terminal Company statute the charter of the Providence is amended in the same manner as is provided in the case of the Old Colony was certified to the United States District Court for the District of Massachusetts, which court has not yet acted upon it (254 I.C.C. 126). R. p. 10217.

[32] *In re New York, N.H. & H. R. Co.*, 54 F. Supp. 595 (1943); R. p. 10695.

[33] R. pp. 10713, 10717, 10718, 10724, 10740, 10741; 147 F. (2d) 40, 44; R. p. 11527.

[34] R. pp. 10713, 10717, 10718, 10724, 10740, 10741.

[35] *In re New York, N.H. & H. R. Co.*, 54 F. Supp. 595, 630 (1943); R. p. 10762.

"After studious review of the entire subject-matter, I can at last say that I am satisfied that the plan in its entirety—with the corrections which are indicated in this opinion,—should be approved.

"The corrections, which I have indicated to eliminate what I conceive to be the unobserved impact of illegal standards and to reflect material changes occurring since the plan came forward, since all based upon findings of the Commission and consistent with its limitations, are all, I believe, within the power of the judge to make. Likewise, as to the constructions which I have put upon the plan.

"But having in mind the thought that the task of the court is brigaded with that of the Commission, let me express the hope that our combined efforts may not suffer from the lack of suitable liaison at this critical stage in the proceedings. And to provide appropriate opportunity for such liaison I will say that if the Commission after reading my opinion shall wish, of its own motion, to file any supplemental report or order, whether adapted to confirm my proposed action or to require action in another direction, I shall be glad to shape my decree accordingly."

The trustee in bankruptcy of The Boston Terminal Company, the Webster & Atlas National Bank of Boston, Trustee under The Boston Terminal Company mortgage, the Mutual Savings Bank Group Committee representing holders of Terminal Company bonds, the Institutional Group Committee for Boston Terminal Company bonds, and the Pennsylvania Railroad Company filed objections with the Interstate Commerce Commission challenging the power of the Commission to file a supplemental report modifying the Fourth Plan in the manner proposed by the court or to deal in any other manner with the plan which the Com-

mission had certified to the court, unless and until the plan had been disapproved by the court and the proceedings referred back to the Commission in accordance with the procedure required by section 77 (e) of the Bankruptcy Act.[36] Notwithstanding these objections, and in the absence of any decree by the court on the Fourth Plan, the Commission, on February 8, 1944, *without any hearing*, rendered its Fifth Supplemental Report and Order,[37] which by its express terms revoked and superseded its orders of February 18, 1941, March 25, 1941, October 6, 1942, and July 13, 1943,[38] and approved a new plan of reorganization for the debtors which adopted some of the changes which the court had proposed to make by judicial decree in the Fourth Plan, expressly rejected others, made some changes which the court had not proposed to make, refused to accept the distribution of securities proposed by the court, and instead prescribed a new distribution of securities which necessitated a substantial increase in the over-all capitalization of the reorganized New Haven as fixed in the Fourth Supplemental Report and Order.[39]

With respect to the Terminal Company statute, the Fifth Supplemental Report and Order, while retaining entirely unchanged the provisions of the Fourth Supplemental Report and Order, added two new paragraphs. One of these imposed upon the trustee in bankruptcy of The Boston Terminal Company the obligation to elect (a power which the Terminal Company itself could not exercise in view of the mandatory character of the Terminal Company statute) whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Terminal Company and file a proof of claim for damages

[36] 257 I.C.C. 9, 10; R. pp. 10834, 10962.
[37] 257 I.C.C. 9; R. p. 10833.
[38] 257 I.C.C. 9, 58; R. p. 10923.
[39] 257 I.C.C. 9, 15, 21; R. pp. 10842, 10843, 10845, 10851, 10852.

in the New Haven proceedings, or will accept the terms proposed in the plan for the proposed modification of the obligations imposed by the Terminal Company statute, upon the condition that either acceptance of the proposed terms or failure to reject the plan within a time to be fixed by the Commission shall operate as a waiver of all claim of damage against the estates of the debtors.[40] The other paragraph purported to give the District Court the power to reshape the plan of reorganization in the event that the features of it relating to the Boston Terminal Company statute should be held to be illegal or "inappropriate for judicial approval."[41]

The Commission, without affording any opportunity for hearing[42] or petition for modification, immediately certified to the court the plan embodied in the Fifth Supplemental Report and Order. Certain of these petitioners then filed with the court motions to strike from the files this so-called Fifth Supplemental Report and Order. At a hearing these motions were denied, subject to exception.[43] The court gave notice to the parties in interest to bring in their objections to the Fifth Supplemental Plan, even though the court also ordered that the objections previously filed to the plan approved by the Fourth Supplemental Report and Order should apply to the plan purportedly approved by the Fifth Supplemental Report and Order.[44] Objections were filed by these petitioners and others. After hearing, the court on March 6, 1944, entered a decree[45] which denied the motions to strike and overruled all objections, both those expressly filed

[40] 257 I.C.C. 9, 25; R. pp. 10859, 10909; Appendix, p. 37.
[41] 257 I.C.C. 9, 25; R. pp. 10860, 10910; Appendix, p. 38.
[42] 147 F. (2d) 40, 44; R. p. 11528. See also R. p. 10835.
[43] R. p. 11053.
[44] 147 F. (2d) 40, 44; R. p. 11528.
[45] R. p. 11050.

against the plan approved by the Fifth Supplemental Report and Order and those which had been filed against the plan approved by the Fourth Supplemental Report and Order, and approved the plan embodied in the Fifth Supplemental Report and Order for the reasons set forth in an opinion of the same date,[46] which also incorporated the reasons contained in the earlier opinion of December 21, 1943, dealing with the Fourth Supplemental Report and Order. No decree on the Fourth Plan was ever entered.[47]

From the decree of March 6, 1944, these petitioners and others appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed the decree so far as it related to these petitioners.[48]

The provisions of the Fifth Plan are set forth in full at pages 10833 to 10928 of the record. Certain parts of the Fifth Plan particularly pertinent to this petition are set forth in the Appendix.

The Massachusetts statutory provisions relating to curtailment of passenger service (as distinguished from the abandonment of lines) are set forth in the Appendix, together with a pertinent extract from the Interstate Commerce Act.

Questions Presented.

1. Were the provisions of the plan contained in the Fifth Supplemental Report and Order, in so far as they affect the petitioners, (*a*) illegal as being an unlawful invasion of the police power of the Commonwealth of Massa-

[46] 54 F. Supp. 631; R. p. 11024.

[47] 147 F. (2d) 40, 44; R. p. 11528.

[48] 154 F. (2d) 40; R. pp. 11525, 11563. The reversal of the decree in part directed the District Court to remand to the Commission a portion of the plan relating to the Old Colony and an order of remand has been made by the District Court to the Commission, which, without hearing, rendered its Sixth Supplemental Report and Order dated May 14, 1945.

chusetts as exercised under chapter 516 of the Massachusetts Acts of 1896, and (*b*) illegal as being an unlawful invasion of the jurisdiction of the Commonwealth of Massachusetts over passenger service to be rendered on railroad lines operated within the Commonwealth?

2. Do the provisions of section 77 of the Bankruptcy Act confer upon the Interstate Commerce Commission and the District Court power by a plan of reorganization *ex proprio vigore* so to amend the charters of the debtor railroads (*a*) as to relieve them from the obligations imposed by the Massachusetts Act of 1896, among said obligations being the requirement that the railroads named in said Act of 1896 use the Boston Terminal for all of their terminal passenger business in Boston, (*b*) as to relieve them of the duty of furnishing passenger service upon their lines while operated within the Commonwealth of Massachusetts as required by the statutes of said Commonwealth?

3. Do the provisions of section 77 of the Bankruptcy Act confer upon the Interstate Commerce Commission and the District Court power to exercise through a plan of reorganization the legislative function of amending a corporate charter granted by the legislature of a sovereign state?

4. Does section 77 confer upon the Interstate Commerce Commission and the District Court power to alter by means of a plan of reorganization relationships between a sovereign state and a debtor incorporated by the state other than a relationship of creditor and debtor?

5. Did the courts below correctly interpret and apply section 77 (b) of the Bankruptcy Act (*a*) in the matter of the amendment of charters of debtors in reorganization proceedings and (*b*) in the matter of making provision for nullification of valid state laws with which a proposed plan would conflict?

6. Do the provisions of section 77 (f) of the Bankruptcy Act add affirmatively to the powers conferred upon the Commission and the District Court by section 77 (b)?

7. Did the courts below correctly interpret and apply that part of section 77 (f) of the Bankruptcy Act which provides that the reorganized debtor shall have full power to carry out the plan, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding"?

8. In formulating and approving a plan of reorganization under section 77 of the Bankruptcy Act may the Interstate Commerce Commission exercise the powers conferred upon it by the Interstate Commerce Act except those expressly authorized by section 77 (q)?

9. Do the provisions of section 77 of the Bankruptcy Act confer upon the Commission and the District Court power to make, upon the terms and conditions stated in paragraphs N(1)(a), N(1)(b) and N(3)(a) of the plan contained in the Fifth Supplemental Report and Order, the modifications stated therein of the obligations of the debtor railroads created and imposed by the Massachusetts Act of 1896 and by the statutes incorporating the debtor railroads and the provisions of the General Laws of Massachusetts relating to the obligations of the debtors to render service on their lines operated within the Commonwealth?

10. Do the provisions of section 77 of the Bankruptcy Act confer upon the Interstate Commerce Commission and the District Court power in and by a plan of reorganization of the debtor railroads in proceedings pending in the District Court of Connecticut to compel the trustee in bankruptcy of The Boston Terminal Company appointed by the District Court of Massachusetts in proceedings pending in that court to elect whether to accept or reject a so-called offer in said plan, said offer being upon terms en-

tirely different from those prescribed and made mandatory upon The Boston Terminal Company by the Massachusetts Act of 1896, which constitutes its charter?

11. Do the provisions of section 77 of the Bankruptcy Act confer upon the Commission and the District Court power by a plan of reorganization *ex proprio vigore* so to amend the charter and to amend or supersede the franchises and statutory obligations of the Old Colony Railroad Company as to relieve it from the obligations imposed by its charter and by the General Laws of Massachusetts to furnish passenger service upon its lines while operated in Massachusetts?

12. Did the Circuit Court of Appeals err in deciding that the District Court had not held and acted in violation of section 77 of the Bankruptcy Act (*a*) in failing to enter an order dismissing the proceedings or referring the proceedings back to the Interstate Commerce Commission for further action as required by section 77 (e) of the Bankruptcy Act after finding that the plan approved by the Fourth Supplemental Report and Order was in essential particulars illegal and inequitable; (*b*) in holding that the District Court had the power to make modifications in essential provisions of the plan and to approve the plan as so modified; and (*c*) in accepting the certification of a Fifth Supplemental Report and Order which without hearings revoked the Fourth Supplemental Report and Order and approved a new plan?

13. Did the Circuit Court of Appeals err in deciding that the Interstate Commerce Commission had not violated the provisions of section 77 of the Bankruptcy Act nor denied to these petitioners due process of law under the Fifth Amendment to the Constitution of the United States in certifying the Fifth Supplemental Report and Order revoking and superseding all former orders and approving a new plan of reorganization while the plan

approved by the Fourth Supplemental Report and Order and certified to the District Court was pending before the District Court?

14. Did the Circuit Court of Appeals err in deciding that the District Court had not violated the provisions of section 77 of the Bankruptcy Act nor denied to these petitioners due process of law under the Fifth Amendment to the Constitution of the United States in approving the plan approved by the Fifth Supplemental Report and Order certified by the Interstate Commerce Commission?

15. Did the Circuit Court of Appeals err in deciding that the Interstate Commerce Commission had not violated section 77 of the Bankruptcy Act nor denied to the petitioners due process of law under the Fifth Amendment to the Constitution of the United States in receiving and adopting *in totidem verbis*, after hearings had closed and without giving to the petitioners an opportunity to be heard thereon, the provisions of the so-called Joint Report, which for the first time proposed that the debtor railroads be relieved from the statutory obligation to use the Boston Terminal?

Reasons for Granting the Writ.

In holding that a plan of reorganization under section 77 of the Bankruptcy Act may lawfully provide for the abrogation of a statute of a sovereign state enacted in the exercise of its police power, the Circuit Court of Appeals (a) decided important questions of law which have not been but should be settled by this Court, and (b) has decided these questions in a way probably in conflict with applicable decisions of this Court.

The District Court, in sustaining the power of the Commission and the District Court through the provisions of

a plan of reorganization to modify the obligations of the debtor railroads under the Massachusetts Act of 1896 to use the Boston Terminal "for all of their terminal passenger business in Boston," rested its decision in part upon the power of the Commission under the Interstate Commerce Act and in part upon its power under the Bankruptcy Act and its decision was affirmed by the Circuit Court of Appeals.

A. The Interstate Commerce Commission was not empowered by Congress to use the powers given it by the Interstate Commerce Act in proceedings under section 77 of the Bankruptcy Act, and in any event no such power as the Commission here purported to use is contained in the Interstate Commerce Act.

In the first place, whether the powers of the Interstate Commerce Commission under the Interstate Commerce Act can be invoked in proceedings under section 77 of the Bankruptcy Act except to the limited extent expressly permitted by section 77 (q) is an important federal question which should be passed upon by this Court.

In the second place, Congress has been careful to withhold from the Commission any power under the Interstate Commerce Act to require the construction or use of terminals by interstate railroads or to fix the terms of their use,[49] and has left this subject entirely to the police power of the states.[50] In holding otherwise the courts below are the only courts which have construed the Interstate Commerce Act as they have construed it, and such construction decides a federal question in a way probably in conflict with the applicable decisions of this Court above cited in

[49] Except in special cases provided for by section 3 (5) of the Interstate Commerce Act which have no application here.

[50] *Interstate Commerce Commission* v. *Los Angeles*, 280 U.S. 52 (1929). *Atchison, Topeka & Santa Fe Ry.* v. *Railroad Commission*, 283 U.S. 380 (1931).

note 50 and presents an important question of federal law under the Interstate Commerce Act which should be settled by this Court.

B. The power which the Commission and the District Court purported to exercise under the Bankruptcy Act was not granted them by that Act.

The District Court in approving the plan of the Fifth Supplemental Report and Order held that section 77 of the Bankruptcy Act empowered the Commission and the District Court by the provisions of a plan of reorganization to supersede a statute of a sovereign state, enacted in the exercise of its police power, and this holding was sustained by the Circuit Court of Appeals.

This Court has held that "the intention of Congress to exclude States from exerting their police power must be clearly manifested," [51] and has held that the police power of the sovereign states is one of the least limitable by federal authority.[52]

Although the Circuit Court of Appeals held that the plan of reorganization constitutes an offer to The Boston Terminal Company as to the *terms* upon which the debtor railroads *may use* the terminal facilities in the future, nevertheless the plan also supersedes the Act of 1896 with respect to the *obligation* of the debtor railroads *to use* the terminal "for all of their terminal passenger business in Boston," and the Circuit Court of Appeals so held, thereby necessarily construing section 77 as being a manifes-

[51] *Napier* v. *Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926); cited with approval in *Allen-Bradley Local* v. *Board*, 315 U.S. 740, 749 (1942). *Kelly* v. *Washington*, 302 U.S. 1 (1937). *Connecticut Light & Power Co.* v. *Federal Power Commission*, decided by this Court March 26, 1945.

[52] *District of Columbia* v. *Brooke*, 214 U.S. 138, 149 (1909). *Eubank* v. *Richmond*, 226 U.S. 137 (1912). *Sligh* v. *Kirkwood*, 237 U.S. 52, 59 (1915).

tation of the clear intent of Congress to grant to the Commission and the District Court power so to do by means of a plan of reorganization. The Circuit Court of Appeals reached this result by invoking the provisions of section 77 (f), giving to the *reorganized debtor upon confirmation of a plan of reorganization* full power and authority to *carry out* the plan, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding."[53] Section 77 (f) is not a grant of power to the *Commission* to formulate terms of a plan of reorganization; that grant is contained in section 77 (b), which confers no power to insert in a plan of reorganization a provision to annul a state statute.

No court except the courts below have construed the provisions of section 77 in this respect as they have construed them, and this construction presents important questions of federal law which should be settled by this Court.

C. To leave unreviewed a holding that the police power of a sovereign state over a union passenger terminal and over passenger service to be furnished on lines operating within the state may be nullified by means of a plan of reorganization of a railroad would invite not only further invasion of the police power of the state in kindred matters such as statutes requiring the abolition of grade crossings and the protection of employees within the state, but also the invasion of the taxing power of a sovereign state over

[53] The statements in *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939) by Mr. Justice Frankfurter on pages 88 and 89 are merely a suggestion of an undecided possibility by way of contrast with what was decided. The issue as to whether the Commission by a plan of reorganization could override a valid state statute was not in issue in the case. It is respectfully submitted that this dictum so fundamentally relied upon by the Commission and the courts below as controlling should be clarified by this Court.

reorganized railroads operating within the state's boundaries under state-granted charters and franchises.

D. Furthermore, the provisions of the plan of reorganization of the Boston & Providence Railroad Corporation proposed by the Commission but not yet acted upon by the United States District Court for the District of Massachusetts (in which court the Boston & Providence proceedings are pending) are similar to those contained in the plan for the New Haven and the Old Colony (Appendix, p. 46). The provisions of the Boston & Providence plan must eventually be acted upon by the District Court in Massachusetts and possibly passed upon by the Circuit Court of Appeals for the First Circuit. It is therefore important that these questions should be determined by this Court in order that a possible conflict of decision between two Circuit Courts of Appeals be avoided.

In holding that section 77 of the Bankruptcy Act empowers the Commission and the District Court by a plan of reorganization ex proprio vigore to amend the charters of the debtor railroads, the Circuit Court of Appeals decided important questions of law which have not been but should be settled by this Court.

Section 77 (b) (5) of the Bankruptcy Act states that a plan "shall provide adequate means for the execution of the plan, which may include . . . the amendment of the charter of the debtor." The District Court construed this language as being a grant of power by Congress to the Commission and the District Court to amend and rewrite (by means of a plan of reorganization) a state statute constituting the charter of a debtor, and this holding was affirmed by the Circuit Court of Appeals.

The clause of section 77 (b) (5) relating to amendment of charters was not in the original act but was inserted

among the amendments of 1935 proposed by the Federal Coordinator of Railroads, who did not list it among the "important amendments proposed."[54] Prior to its adoption it was not even referred to in the hearings before the House Judiciary Committee, or in the debates in the House and Senate upon passage of the bill.[55] The history of this legislation discloses no clear intent on the part of Congress to confer upon the Commission power to amend state charters by a plan of reorganization *ex proprio vigore* rather than to provide for application to the state of incorporation for whatever amendments might be necessary.

The function of granting and amending charters of corporations is pre-eminently legislative and not administrative or judicial. Though Congress itself, acting as a legislative body, may charter a corporation in certain circumstances, it cannot delegate to a commission or to the federal courts such a peculiarly legislative function. Even if Congress acting as a legislative body could amend a state charter, it could not legally delegate such a legislative function to a commission or to a court.

Even if the bankruptcy power could be so broadly construed as to empower Congress to delegate the function of amending charters granted by the authority of a sovereign state, there is no apt language in the Bankruptcy Act to show a clearly manifested intent on the part of Congress to exercise such a power.[56]

No court except the courts below have construed the provisions of section 77 of the Bankruptcy Act as they did, and this construction presents important questions of fed-

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[54] Report of the Federal Coordinator of Transportation of 1934.

[55] 74th Congress, Railroad Reorganization Hearings, 1935, on H.R. 6249, pp. 1-330. 74th Congress, Congressional Record, pp. 13298-13309, 14139, *et seq.*

[56] *Palmer* v. *Massachusetts*, 308 U.S. 79, 83 (1939). *Kelly* v. *Washington*, 302 U.S. 1 (1937).

eral law which have not been but should be settled by this Court.

In holding that the provisions of a plan of reorganization may amend and supersede the franchise and charter granted the Old Colony by the Commonwealth of Massachusetts so as to relieve the Old Colony from its obligation to furnish passenger service on its lines operated within the Commonwealth, the Circuit Court of Appeals decided important questions of law which have not been but should be settled by this Court.

The Old Colony is required by its charter to furnish passenger service upon its lines operated within the Commonwealth of Massachusetts unless relieved from such requirement by the Commonwealth.[57] Although section 77 (b) (5) of the Bankruptcy Act states that a plan of reorganization "shall provide adequate means for the execution of the plan, which may include . . . the sale of all or any part of the property of the debtor . . . ," nowhere in section 77 is power given the Commission or the courts through a plan of reorganization to authorize a cessation of passenger service on lines which the debtor continues to operate.[58]

The decision by the Circuit Court of Appeals that section 77 (f) is such a grant of power presents an important question of federal law which has not been but should be passed upon by this Court.

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[57] Mass. Acts of 1872, c. 143. Mass. General Laws, c. 159, secs. 16, 16A; c. 160, secs. 128, 129. See Appendix, pp. 49, 50.

[58] Section 77 (o) provides for complete abandonment of lines of railroad during the pendency of the proceedings but this does not permit curtailment of passenger service. *Palmer* v. *Massachusetts*, 308 U.S. 79 (1939). The same rule applies under the Interstate Commerce Act. *Kansas City S. Ry. Co., Application*, 94 I.C.C. 691. *Morris & E. R. Co. Abandonment*, 175 I.C.C. 49.

In holding that section 77 of the Bankruptcy Act confers upon the Commission and the District Court power by a plan of reorganization to compel the trustee in bankruptcy of a railroad in reorganization in another jurisdiction to elect whether to accept or reject a so-called offer contained in said plan, the Circuit Court of Appeals has decided important questions of law which have not been but should be settled by this Court.

Granting that the Commission has the power to approve a plan of reorganization making an offer to a third person, the provisions of paragraph N(1)(b) of the plan impose upon the trustee in bankruptcy of The Boston Terminal Company the *obligation to elect* whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Terminal Company and file a proof of claim for damages in the New Haven proceedings, or will accept the terms proposed in the plan, upon the condition that either acceptance of the proposed terms or *failure to reject the plan within a time to be fixed by the Commission* shall operate as a waiver of all claim of damages against the estates of the debtors. The trustee in bankruptcy of The Boston Terminal Company was appointed by the United States District Court for the District of Massachusetts in a proceeding under section 77 for the reorganization of that company. The Massachusetts Act of 1896, which constitutes the charter of The Boston Terminal Company, is mandatory upon the Company and contains no language which permits the Terminal Company itself to relieve the railroads named in the act from the obligations imposed by it, and such attempted action on the part of the company would be clearly *ultra vires*.[59] The trustee in bankruptcy of the Terminal Company can have no greater rights. The holding of the Circuit Court

[59] *Hurley* v. *Boston Railroad Holding Co.*, 315 Mass. 591 (1944).

of Appeals that a plan of reorganization of the debtor railroads may force upon the trustee of another corporation in bankruptcy in separate proceedings in a different court the acceptance or rejection of such an offer under such terms and penalties is beyond the power granted by section 77.

No court except the courts below has construed the provisions of section 77 of the Bankruptcy Act as they have construed them, and this construction presents important questions of federal law which have not been but which should be settled by this court.

In holding that the procedure adopted by the District Court in its treatment of the Fourth and Fifth Supplemental Reports and Orders was proper, the Circuit Court of Appeals decided important questions of law which have not been but should be settled by this Court, and has so departed from the accepted and normal course of judicial proceedings as to call for an exercise of this Court's power of supervision.

There can be no doubt that the jurisdiction of the Interstate Commerce Commission and of the District Court under section 77 of the Bankruptcy Act is wholly statutory and must be exercised in the manner prescribed by Congress.[60]

Section 77 (e) of the Bankruptcy Act clearly and explicitly states that after approval but *before certification* of a plan the Commission may modify it, and that after the Commission has finally approved a plan and certified it to the court, together with a transcript of the proceedings before it and a copy of the report and order approving the plan, all parties in interest may file objections and claims which shall be heard by the judge, who shall thereafter

[60] *Ecker* v. *Western Pacific Railroad Corp.*, 318 U.S. 448 (1943).

approve the plan if satisfied it is fair and equitable and complies with the legal standards of section 77. The plan approved by the Third Supplemental Report and Order was modified before certification by the plan which was approved by the Fourth Supplemental Report and Order and the plan as finally approved by the Fourth Supplemental Report and Order was certified to the court, together with a transcript of the proceedings. The District Court in its opinion of December 21, 1943, on the plan approved by the Fourth Supplemental Report and Order found that the plan in essential particulars failed to conform to legal standards [61] and expressly sustained objections to the plan.[62] Section 77 (e) provides that if the judge shall not approve a plan he shall file an opinion and shall enter an order "in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action." If the proceedings are referred back, the Commission shall proceed to a reconsideration of the proceedings under subsection (d) of section 77, which requires public hearings by the Commission, at which opportunity shall be given to any interested party to be heard. It therefore became the duty of the District Court, upon finding that the Fourth Plan failed to conform to legal standards, to comply with section 77 (e). The court could not improve the plan by correcting it by judicial decree.[63] Nevertheless, the court proposed to do just this by making the "corrections which are indicated in this opinion," but first invited the Commission to file a supplemental report or order and proposed to shape its decree in

[61] R. pp. 10713, 10717, 10718, 10724, 10740, 10741.

[62] R. pp. 10713, 10717, 10718, 10724, 10740, 10741. 147 F. (2d) 40, 44; R. p. 11527.

[63] *Ecker* v. *Western Pacific Railroad Corp.*, 318 U.S. 448, 474 (1943).

accordance with the response of the Commission.[64] Due objections were made by certain of your petitioners to this procedure, both to the Commission and to the District Court. The Commission (without a hearing and without affording any interested party an opportunity to be heard) nevertheless then issued its Fifth Supplemental Report and Order, which approved a plan radically different from that approved by the Fourth Report and Order, which was still pending before the District Court. The Fifth Report and Order expressly revoked the Fourth Supplemental Report and Order and the plan which that report had approved.[65] It was immediately certified to the Court without opportunity either for hearing or for petition to modify.

Obviously, if procedure of this character can be adopted, a District Court may circumvent the statutory requirements by retaining control of a plan which it disapproves, calling upon the Commission to report further plans until one satisfactory to the Court is reported, all without hearings before the Commission as required, even though (as in the present case) the final plan may be materially different from the plan first reported by the Commission and still in the control of the District Court and even without an opportunity to file a petition for modification.

No decision of this Court or of any other court other than the courts below has so construed the provisions of section 77, and the holding of this Court in *Ecker* v. *Western Pacific Railroad Corp.*, 318 U.S. 448, 474,[66] is apparently in conflict with the construction of section 77 adopted by the courts below. This construction by the courts below presents important questions of federal law under section

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[64] R. p. 10762.

[65] R. p. 10923.

[66] See also *Louisville & Nashville R.R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217.

77 of the Bankruptcy Act which should be settled by this Court.

In approving the conduct of the Interstate Commerce Commission in receiving and acting upon the proposals of the Joint Report and adopting them in totidem verbis in the plan of reorganization, without hearings thereon, the Circuit Court of Appeals denied to the petitioners due process of law and acted in violation of the provisions of section 77 of the Bankruptcy Act.

Section 77 (d) provides expressly that the Commission shall "hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, . . ." In spite of this provision the Commission, although the record was closed except for the purpose of receiving further proposals from the Compromise Committee, accepted and acted upon a Joint Report signed, not only by the Compromise Committee, but by other New Haven and Old Colony interests,[67] which changed radically the report of the Compromise Committee by suggesting for the first time in these proceedings that the New Haven and Old Colony be relieved of their statutory obligation to use the Boston Terminal for all of their terminal passenger business in Boston. Upon this radical proposal vitally affecting the welfare of the Commonwealth and of the City of Boston and the interests of the Terminal Company and its creditors, no opportunity was given them to be heard. Your petitioners respectfully submit that this action was not only in violation of section 77 but in violation of the fundamental principles of due process of law, and that this Court should

[67] R. pp. 9817, 9818, 209, 234, 235.

review the action of the Commission and the courts below in approving such action.

Conclusion.

In sustaining the order of the District Court the opinions below dealt with questions of interpretation of section 77 of the Bankruptcy Act, both as to procedure and as to matters of substance, that never have been but should be passed upon by this Court; has decided federal questions in a way probably in conflict with applicable decisions of this Court; has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision; and has sustained action by the District Court and by the Interstate Commerce Commission in matters vitally affecting the petitioners in violation of the Constitutional guaranty of due process of law.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix.

FIFTH SUPPLEMENTAL REPORT AND ORDER OF INTERSTATE COMMERCE COMMISSION, PARAGRAPHS N AND O, PAGES 10908-10920.

N. The reorganized company shall acquire as a part of its reorganization all of the properties, franchises, and assets of the Old Colony except those of the Old Colony's Boston group (those covered in Finance Docket No. 12614) upon the terms and conditions as follows:

1 (a) The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old Colony (including any charter, franchises, and statutory obligations acquired by the reorganized company in connection with the acquisition of the properties, assets, and franchises of any other railroad, and as operator of the Boston group) shall be amended or superseded so that (1) the reorganized company and Old Colony will be relieved of any obligation to continue to use the property of the Boston Terminal Company, and of any obligation to make any payments for such use if and when such use shall be discontinued; (2) the obligation of the reorganized company and Old Colony and their trustees to make payments on account of interest and principal (at maturity or otherwise, including any deficiency on foreclosure or any other claim with respect thereto) of the debt of the Boston Terminal Company represented by its presently outstanding bonds (or any extensions, renewals or refunding thereof) after the date on which the trustees have made the last payments on account of interest on said bonds, shall, so long as the reorganized company (for itself or as operator of the Boston group) shall use the property of the Boston Terminal Company, be satisfied by payment by

the reorganized company of an amount per annum (and at that rate for any period of less than a year) obtained by applying to $275,000 the percentage of the total use of such property from time to time by the principal debtor (including in such percentage prior to the consummation of the plan use by its trustees for itself and as operators of Old Colony and thereafter use by itself and as operator of the Boston group); and (3) the obligation to pay operating expenses shall be limited to the amount of such expenses after deducting all revenues from rentals and concessions; provided, however, that, if the number of passengers using the South Station of the Boston Terminal Company shall substantially increase in the future, this Commission will consider an application by any bondholder of the Terminal Company to make an equitable revision of the amount payable by the reorganized company.

(b) The trustee in bankruptcy of the Boston Terminal Company or any receiver in equity which may hereafter be appointed by any court of competent jurisdiction to manage the property and affairs of such corporation shall have the right to elect whether he will exclude the using bankrupt railroads from further occupation and use of the property of the Boston Terminal Company and file a proof of claim for damages in these proceedings, or will accept the terms proposed in the plan for the continued occupation and use of such property by such railroads and thereby waive all claim of damages arising from the rejection and all claims for compensation for the use of its property other than such compensation as is provided by the plan, such election to be exercised upon the submission to him by this Commission of the plan for acceptance or rejection under section 77 (e) of the Bankruptcy Act and within such time thereafter as this Commission in its order of submission shall fix; provided, however, that if such

trustee or any successor-receiver shall not exercise his election by rejecting the plan within the time thus limited, and shall not file a claim for damages herein within the 2 weeks next succeeding, then such trustee, his successor-receiver, the Boston Terminal Company and its creditors and stockholders shall, each and every one of them, be barred from participating as a creditor or creditors in these proceedings, or from prosecuting any claim for damages against the estate of the using bankrupt railroads.

(c) In the event that on an appeal from an order of the court approving this plan, any features of the plan relating to the obligations of the principal debtor and of the Old Colony to the Boston Terminal Company shall be held to be illegal (to have been inappropriate for judicial approval), if not inconsistent with the directions of the appellate mandate the court may thereupon delete from this order (a) all provisions designed to modify or affect the obligations of the principal debtor to the Boston Terminal Company, or any provisions inconsistent with the appellate opinion, and (b) all provisions relating to the acquisition by the principal debtor of the property and assets of the Old Colony or of the Boston & Providence, or both of them, whereupon this order as thus modified may be deemed to state a separate plan for the reorganization of the principal debtor together with the Hartford & Connecticut Western and the Providence, Warren & Bristol, or, if its provisions for the acquisition of the property and assets of the Old Colony and the Boston & Providence shall not have been deleted, as a comprehensive plan to include the acquisition of such properties upon the terms of the order thus modified.

(2) (a) The charter of the reorganized company and of Old Colony shall be amended, and the franchises and statutory obligations of the reorganized company and of Old

Colony shall be amended or superseded so that neither road will be under any obligation to operate passenger service on Old Colony lines. The reorganized company shall, however, undertake a contractual obligation to operate, for its own account and sole benefit, freight service on the Boston group until such time as it shall acquire the assets and franchises of that group. It shall further undertake a contractual obligation to operate for its own account passenger service on Old Colony lines if and so long as the losses therefrom do not exceed the critical figures provided below. These agreements shall take the form of a stipulation by the reorganized company before the court. The contractual obligation to operate passenger service shall terminate if legislation described below in (c) has not been passed prior to the end of 2 years after consummation of the plan.

(b) The reorganized company shall not be obligated to acquire the assets and franchises of Old Colony's Boston group along with the Old Colony's other assets upon the consummation of the plan, but shall have the right without the payment of further consideration on its part to acquire such assets and franchises at, or at any time after, the consummation of the plan. Until such acquisition, the assets and franchises of the Boston group shall remain in Old Colony, the stock of Old Colony shall be reduced to equal in par value the net salvage value ($2,328,895) of the assets in the Boston group, and the reduced stock shall be held by one or more trustees appointed by the court for the benefit of the holders of Old Colony's bonds (including its banks) at the date of the consummation of the plan. At any time, such trustee or trustees shall, upon demand of the reorganized company, convey to it the assets and franchises of the Boston group or, at the option of the reorganized principal debtor, the reduced Old Colony stock held by them.

(c) The foregoing parts (a) and (b) are subject to the proviso that if the Legislature of Massachusetts shall amend the charter of the reorganized company so that it will be under no charter obligation to operate passenger service on Old Colony lines, and provide that such service shall be operated only by virtue of, and in accordance with, the agreement referred to in (a) above, or shall by legislation provide equivalent protection (such as that resulting from the formation of a transportation district to take over the passenger service on the Boston group), then, upon consummation of the plan, if such legislation be passed prior thereto, or upon the passage of such legislation within 2 years after the consummation of the plan, the Boston group shall be acquired by the reorganized company.

(3) (a) Passenger service on Old Colony's lines may be discontinued if during any of the periods described below passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect. The critical figure for the initial critical period which shall comprise the 2 years following the consummation date or January 1, 1946, whichever shall be the later, shall be $850,000 for any 12 consecutive calendar months falling wholly within said initial critical period. The critical figure for any 24 consecutive calendar months, all of which shall be subsequent to the initial critical period, shall be $500,000. In the event that passenger losses on Old Colony's lines shall exceed the critical figure at the time in effect, and if as a result thereof the reorganized principal debtor or the Old Colony shall elect to discontinue passenger service on Old Colony's lines, the Commonwealth of Massachusetts shall have the option of purchasing that portion of the Boston group lines extending from Boston to Braintree at the salvage value thereof which has been accepted for the pur-

poses of the plan (the proportion of $2,328,895, the salvage value of the entire Boston group lines estimated in 1939, applicable to the Braintree branch), plus the depreciated amount of capital improvements made since the date of the appraisal, said option, however, to be limited to such facilities appurtenant to said Boston-Braintree segment as shall reasonably be required by the Commonwealth of Massachusetts for its passenger operation and subject to a right in the reorganized company or in the Old Colony, as the case may be, to make joint use of such of said facilities as are not reasonably required for the exclusive use of the Commonwealth of Massachusetts; provided, however, that such option shall be valid only for a period of 10 years after the consummation of the plan; and provided further that in the event the Commonwealth of Massachusetts shall exercise the option provided herein, the reorganized principal debtor and the Old Colony shall so far as possible accord to the Commonwealth the right to use the Boston Terminal Company property on the same terms and conditions as possessed by the reorganized principal debtor and the Old Colony. Full jurisdiction shall be reserved to the court to determine at the appropriate time, if future controversies should arise, what facilities are in fact reasonably needed for such passenger operation by the Commonwealth and the salvage value thereof as established by the method indicated in the subsection of the plan, and to enter any and all appropriate orders in the premises.

(b) As a basis for determining whether or not the critical figure in effect at the time is being met, the reorganized company shall keep monthly figures of the amount of passenger loss on Old Colony lines. Those figures shall be based upon the application of the segregation formula as approved by this Commission and the court in this proceeding, and the further apportionment of Old Colony's

revenues and expenses between passenger and freight service under the general principles of this Commission's prescribed rules for separating common revenues and expenses between passenger and freight service, modified where necessary to be consistent with the apportionments made in the segregation formula and in the light of data reasonably available for such separation. The formula for this computation is annexed hereto as exhibit A. The result of such computation shall determine whether or not the critical figure has been met, unless the Department of Public Utilities of Massachusetts shall deem the Commonwealth or the public aggrieved by a proposed discontinuance of passenger service on Old Colony lines pursuant to the authority contained in the plan and claim that the computations of the reorganized company are inaccurate; in which case it may apply to the District Court for the District of Connecticut for the appointment of a master to audit such computations. The result of such audit shall in all respects be given the same effect as the report of a special master. In such case, whether or not the critical figure has been met shall be determined by the computations as the same may be modified in such proceedings.

(c) In the event that on appeal from an order of court approving this plan any feature of section N(2), (a) to (c), inclusive, or of section N(3), (a) and (b) shall be held to be illegal or inappropriate for judicial approval, if not inconsistent with the appellate mandate, the court may thereupon delete from this order (a) the feature or features thus disapproved and (b) all provisions relating to the acquisition by the principal debtor of the property and assets of the Old Colony, whereupon this order as thus modified may be deemed to state a separate plan for the reorganization of the principal debtor together with the Hartford & Connecticut Western and the Providence, Warren & Bristol or, if its provisions for the acquisition

of the Old Colony shall not have been so deleted, as a more comprehensive plan to include the acquisition of the Old Colony as well, upon the terms of the order thus modified.

(4) In consideration of the transfer and conveyance to the reorganized principal debtor of (a) all assets, properties and franchises of Old Colony other than those of its Boston group and (b) the rights set forth above relating to the Boston group, the reorganized company shall issue and deliver to Old Colony's bondholders (including its banks as holders of the bonds pledged to secure their notes) pro rata, at the same time as reorganization securities are distributed to the principal debtor's creditors, in full satisfaction of their rights with respect to such bonds and notes: $4,063,784 of new first and refunding bonds, series A, and $3,047,838 of new income bonds, series A; and the reorganized company shall also issue $857,143 of additional new first and refunding bonds, series A, and $642,857 of additional new income bonds, series A, of which the reorganized company shall deliver as aforesaid so much in principal amount, in the ratio of 32,896 of fixed interest bonds to 24,672 of income bonds, as the actual credit to Old Colony for the year 1943 shall exceed $346,000: and the reorganized company shall also (subject to the limitation provided herein concerning the Boston Terminal Company) assume and pay (a) the reorganization expenses of Old Colony as allowed by the court within the maximum limits fixed by this Commission, (b) current liabilities of Old Colony incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are entitled to priority over the Old Colony's secured obligations, (c) current liabilities and obligations of Old Colony trustees incurred during the reorganization proceeding, (d) any and all taxes due to the United States, the Commonwealth of Massachusetts, and/or any city, town, or other political subdivision there-

of, from the Old Colony or its trustees for any taxable period prior to the date of confirmation of the plan of reorganization, without requiring proof thereof in the reorganization proceeding and without prejudice by reason of not having been approved in such proceeding, subject, however, to the statutes of limitations normally applicable to the assessment and collection of such taxes, and provided further, that the liability of the Old Colony for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided further, that this provision shall not be deemed to preclude either the reorganized company, the Old Colony, or its trustees, from contesting the merits of any such tax in the manner provided by law, and provided further, that with respect to taxes the funds for the payment of which are withheld by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof as shall be agreed upon with the proper taxing authorities; provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property; and (e) the reorganized company shall assume and discharge any and all other claims against the Old Colony which, as of the date of confirmation of the plan of reorganization, have been allowed by the court, excluding, however, any claims ranking junior to Old Colony's bonds.

(5) All claims against the Old Colony or its trustees held by the principal debtor or its trustees, and all claims against the principal debtor or its trustee or the Bankers Trust Company held by the Old Colony or its trustees shall be released, discharged, and canceled.

(6) Whenever any dividend or distribution is declared on the common stock of the reorganized company, (additional) funds in an amount hereinafter specified shall be set aside in a sinking fund and used for the purchase or redemption and retirement of the reorganized company's income bonds issued under the plan, and, in case all of such income bonds shall have been retired, to the purchase or redemption and retirement of its preferred stock issued under the plan. The funds to be set aside in the sinking fund shall be equal to (1) the aggregate amount of the dividend or distribution declared on the common stock, times (2) the ratio of (a) the amount of the lease claim of the Old Colony as finally allowed by the court (including any interest allowed) to (b) the aggregate amount of the allowed claims (including any allowed interest) of all other unsecured creditors exclusive of the Boston & Providence.

In the event that, as conditionally authorized elsewhere in the plan, the principal debtor is separately reorganized without provision for the reorganization of the Old Colony, and in the event the trustees of the Old Colony are successful in their suit against the Bankers Trust Company, trustee under the first and refunding mortgage of the principal debtor, arising out of the rejection of the Old Colony lease by the trustees of the principal debtor and in the event the Bankers Trust Company successfully asserts a lien for indemnity against the property subject to the first and refunding mortgage, the plan shall be modified so as to provide that the reorganization committee shall reserve a sufficient amount of the reorganization securities distributable to the holders of bonds secured by the first and refunding mortgage and creditors junior thereto as security for the discharge of any balance of the lien recovered by the principal debtor's trustees on account of their administrative claim against the Old Col-

ony's estate as may be properly applicable thereto, and such amount of available cash, which, in the judgment of the reorganization committee, may appropriately be applied for this purpose without impairing or disturbing other provisions of the plan, and the cash position of the reorganized company. To the extent that the reorganization securities distributable to the holders of bonds secured by the first and refunding mortgage shall be required to satisfy this lien, appropriate adjustment, under the supervision of the court, shall be made by a redistribution of the remaining securities at the expense of creditors junior to such holders.

O. The reorganized company shall acquire, as promptly as possible, all of the properties, franchises, and assets of the Boston and Providence Railroad Corporation, hereinafter called the Boston & Providence, on the terms and conditions set out below, such acquisition to take place in the event of, and upon confirmation of, the Boston & Providence plan concurrently approved by us in Finance Docket No. 12131.

(1) The plan of reorganization of the Boston & Providence will, as to charter, franchise, and statutory obligations of the Boston & Providence, confirm the limitations set forth in section N (1) of this order and provide that, with respect to the Boston Terminal Company, the obligations of the Boston & Providence shall be no greater than those of Old Colony therein set forth.

(2) In consideration for the transfer and conveyance to the reorganized company of all assets and property of the Boston & Providence, the reorganized company shall issue and deliver to the Boston & Providence trustees $3,039,213 of its first and refunding bonds, series A, $1,467,520 of its income bonds, series A, and $1,467,520 of its preferred stock, series A, and the reorganized company shall also (subject to the limitation provided herein con-

cerning the Boston Terminal Company) assume and pay (a) the reorganization expenses of the Boston & Providence, as allowed by the court within the maximum limits fixed by this Commission, (b) current liabilities of Boston & Providence incurred in the ordinary conduct of its business prior to the institution of its reorganization proceeding which are entitled to priority over the Boston & Providence's debentures, (c) current liabilities and obligations of the Boston & Providence trustees incurred during its reorganization proceeding, (d) any and all taxes due to the United States, the Commonwealth of Massachusetts, the State of Rhode Island, and/or any city, town, or other political subdivision thereof, from the Boston & Providence or its trustees for any taxable period prior or subsequent to the date of confirmation of a plan of reorganization for the Boston & Providence, without requiring proof thereof in the reorganization and without prejudice by reason of not having been proved in the Boston & Providence reorganization proceeding, subject, however, to the statutes of limitations, if any, normally applicable to the assessment and collection of such taxes, and provided, further, that the liability of the Boston & Provdience for any taxes which are the subject of litigation on the date of the confirmation of the plan of reorganization, or which may become the subject of litigation on any date thereafter and prior to the expiration of the applicable statutes of limitations, shall be determined pursuant to law, and provided, further, that this provision shall not be deemed to preclude either the reorganized company, the Boston & Providence, or the latter's trustees, from contesting the merits of any such tax in the manner provided by law, and provided, further, that, with respect to taxes the funds for the payment of which were not advanced by the principal debtor's trustees, payment by the reorganized company shall be limited to such portion of the total amount thereof

as shall be agreed upon with the proper taxing authorities, provided, however, that nothing herein shall be construed as impairing or disturbing any present or future lien for taxes against any property and (e) the reorganized company shall assume and discharge any and all other claims against the Boston & Providence which, as of the date of confirmation of the plan of reorganization of the Boston & Providence, having been allowed by the court of jurisdiction in the proceeding for the reorganization of that corporation, excluding, however, any claims represented by the Boston & Providence debentures and any claims not ranking senior thereto.

(3) All claims against the Boston & Providence or its trustees held by the principal debtor or its trustees, including any claims of the Old Colony's trustees, and all claims against the principal debtor and the Old Colony or their trustees held by the Boston & Providence or its trustees shall be released, discharged, and canceled.

(4) Whenever any dividend or distribution is declared on the common stock of the reorganized company, (additional) funds in an amount hereinafter specified shall be set aside in a sinking fund and used for the purchase or redemption and retirement of the reorganized company's income bonds issued under the plan, and in case all of such income bonds shall have been retired, to the purchase or redemption and retirement of its preferred stock issued under the plan. The funds to be set aside in the sinking fund shall be equal to (1) the aggregate amount of the dividend or distribution declared on the common stock, times (2) the ratio of (a) the amount of the lease claim of the Boston & Providence (which for the purpose of this provision shall be $10,000,000) to (b) the aggregate amount of the allowed claims (including any allowed interest) of all other unsecured creditors exclusive of the Old Colony.

INTERSTATE COMMERCE ACT, ACT OF FEBRUARY 28, 1920, C. 91, SEC. 1; 41 STAT. 474, SEC. 1, AS AMENDED, 49 U.S.C. SEC. 1.

(17) . . . *Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter.

MASSACHUSETTS GENERAL LAWS (TER. ED.) C. 159, SECS. 16 AND 16A.

SECTION 16. If the department is of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the department shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. The department may after such a hearing, order any railway company to build and operate any just and reasonable extensions of its lines for which it may have been or may be granted locations and order from time to time that a railroad company shall operate its lines, of standard gauge, or such parts thereof as the department shall prescribe, by electric power instead of steam power, and in its order shall prescribe the time within which the work of electrification shall be done. Before making such order, the department shall consider the relative importance and necessity of the changes in any specific regulations, prac-

tices, equipment and appliances proposed to be included therein and of other changes which may be brought to its attention in the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the department of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public. Every such common carrier shall obey every requirement of every such order so served upon it, and do everything necessary or proper in order to secure absolute compliance with every such order by all its officers, agents and employees.

SECTION 16A. The department before authorizing any railroad to discontinue or abandon any of its lines, stations or other service, may consider, in addition to other facts, the revenues of said railroad from all sources.

MASSACHUSETTS GENERAL LAWS (TER. ED.) C. 160, SECS. 128, 129.

SECTION 128. A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station, unless it is relocated under the following section, nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon.

SECTION 129. A railroad corporation may relocate passenger stations and freight depots, with the written ap-

proval of the department and of the board of aldermen of the city or the selectmen of the town where such stations or depots are situated.

MASSACHUSETTS ACTS AND RESOLVES OF 1896, C. 516.

AN ACT TO PROVIDE FOR A UNION STATION FOR PASSENGERS ON RAILROADS ENTERING THE SOUTHERLY PART OF THE CITY OF BOSTON.

Be it enacted, etc., as follows:

SECTION 1. Charles F. Choate, William Bliss, William T. Hart, Royal C. Taft, and Charles P. Clark, their associates and successors, are hereby make a corporation by the name of The Boston Terminal Company, with power to construct and maintain a union passenger station in the southerly part of the city of Boston, and to provide and operate adequate terminal facilities for the several railroad companies hereinafter authorized to hold the stock of said terminal company, and for the accommodation of the public in connection therewith.

SECTION 2. The capital stock of said corporation shall be five hundred thousand dollars, and the Boston and Albany Railroad Company, the New England Railroad Company, the Boston and Providence Railroad Corporation, the Old Colony Railroad Company, and the New York, New Haven and Hartford Railroad Company, being lessee of the Old Colony Railroad Company, may each subscribe for and hold one fifth portion of the said capital stock. The corporation may by by-laws regulate the terms and conditions upon which its stock may be transferred. All said capital stock shall be paid in in cash by said railroad companies before the corporation takes any land under the provisions of this act.

SECTION 3. The immediate government and direction of the affairs of said terminal company shall be vested in a board of five trustees, to be appointed at once on the organization of said company, one of whom shall be appointed by each of said railroad corporations from its directors, to hold office as such trustee at the pleasure of the corporation by whom he is so appointed; any vacancy to be filled in like manner. The trustees shall elect one of their number to be chairman, and may elect another to be vice chairman, and shall choose a clerk who shall be sworn, and a treasurer who shall give bond in the sum required by the by-laws, with surety, for the faithful discharge of his duties.

SECTION 4. Said terminal company, to provide means to carry out the purposes of this act, may from time to time issue coupon or registered bonds, in sums of not less than one hundred dollars each, payable at periods not exceeding one hundred years from the date thereof, bearing interest not exceeding four per cent. per annum, payable annually, semi-annually, or quarterly, to such an amount as may be necessary and as may be approved by the board of railroad commissioners. No bonds shall be issued unless approved in writing by at least three of the trustees of the corporation. Said corporation may mortgage or pledge as security for the payment of such bonds or of any bonds given in renewal thereof, a part or all of its real estate and other property. In case any mortgage made to secure bonds issued by the terminal company under the provisions of this act shall be foreclosed, and there shall not be thereby realized a sum sufficient to pay all the then outstanding bonds secured by said mortgage, said railroad companies shall be held liable to pay any deficiency in the amount required to pay all of said bonds and the interest thereon in such proportions as may be just and equitable, having regard to the use which they or their lessees may have

respectively had of the mortgaged property; and the supreme judicial court shall have jurisdiction in equity to determine such proportions and to compel such payments to be made, so that the full payment of the principal and interest of bonds issued under the provisions of this act by the terminal company shall not in any event fail. Any such mortgage shall be made to a trustee or trustees approved in writing by the board of savings banks commissioners, and savings banks and institutions for savings may invest in such bonds when so secured.

SECTION 5. Said terminal company may purchase or otherwise take in fee the whole or any part of the land in the city of Boston within the following limits, that is to say:—Beginning at the easterly corner of Atlantic avenue and a way called Summer street, thence bounded by the northerly line of said way extended to Fort Point channel; thence by said channel to Broadway; thence by Broadway to the westerly line of Lehigh street; thence by the westerly line of Lehigh street and by South street, Kneeland street and the westerly line of Cove street extended to Federal street; thence by the westerly line of Federal street to Summer street, and thence across public ways to the point of beginning; and may discontinue and occupy for its purposes all streets and rights of way embraced within the land so acquired: *provided, however,* that no land belonging to the Boston and Albany Railroad Company or to the Old Colony Railroad Company shall be taken by said terminal company without the consent of the directors of both of said railroad companies; and *provided, further,* that the portion of Federal street to be discontinued under the provisions of this act shall not be closed to travel prior to the completion of the extension of Summer street and the extension of Dorchester avenue hereinafter provided for, and the opening of the same to travel, unless a temporary provision for the travel over such portion of

Federal street, so that the travel shall not be interrupted, is provided for in some manner approved by the mayor, such temporary accommodation to continue until the completion of said Dorchester avenue and Summer street, and *provided, further,* that if said terminal company shall take for the purpose of this act any part of the land within the limits before described, owned by the Boston Gas Light Company, it shall take the whole of the land owned by said Boston Gas Light Company within said limits.

Section 6. Said terminal company, upon the passage of this act, shall forthwith organize, and thereupon the trustees thereof shall at once prepare plans and specifications for the construction of a union passenger station upon land herein-above authorized to be taken, adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the companies and of the public, exhibiting its form, dimensions of walls, rooms and partitions, and arrangements, and its location with reference to the adjacent streets and to the tracks of all said railroad companies located or proposed to be located in the vicinity thereof, and any projections over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval, who shall forthwith approve or disapprove them in writing. The trustees shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require. Said station shall be constructed by the terminal company according to the plans thus approved by the board of railroad commissioners, or as the same may be changed, as hereinafter provided. The supreme judicial court, or any justice

thereof, shall have jurisdiction in equity to enforce the provisions of this section.

SECTION 7. Said terminal company, within three months after the plans of said union station are approved as above-provided, shall file in the registry of deeds for the county of Suffolk a location of the lands hereby authorized to be taken by it, or of such part thereof as it then deems it necessary to acquire, and shall proceed with all reasonable diligence to the construction and completion of such union passenger station according to said plans. But the trustees of the terminal company may from time to time propose to the mayor of Boston any changes in said plans, and the mayor shall forthwith approve or disapprove such changes in writing, and the trustees shall then at once submit such changes to the board of railroad commissioners, who, after notice to the mayor and to the railroad companies, and a hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of all said railroad companies require.

SECTION 8. Said terminal company, upon the completion of said union passenger station and grounds, shall make reasonable rules and regulations for their use; and the board of railroad commissioners, upon the application of either of said companies or of the mayor of the city of Boston, and a hearing may, from time to time, make any modification of such rules and regulations which they may deem just and reasonable. Such rules and regulations shall be binding upon all corporations and persons in the use of said station and grounds, and shall be enforced by railroad police officers who may be appointed upon the application of the terminal company, in the same manner and with the same powers in said station and grounds, and with like liability of the terminal company for their acts, as railroad police officers under the general law.

SECTION 9. All said railroad companies upon the completion of said station shall use the same, and the terminal facilities provided by said terminal company on the land herein-above authorized to be taken, for all of their terminal passenger business in Boston, instead of the passenger terminals now used by them, and the supreme judicial court, or any justice thereof, shall have jurisdiction in equity to enforce this provision; but said terminal company may contract with either of said railroad companies for the use of such separate and specified portion or portions of the terminal station hereinafter provided for as may be reasonably necessary for their respective use.

SECTION 10. Said railroad companies hereby required to use said union station shall pay to the terminal company for such use, in monthly payments, such amounts as may be necessary to pay the expenses of its corporate administration and of the maintenance and operation of said station, and of the facilities connected therewith and owned by said terminal company, including insurance and all repairs, all taxes and assessments which may be required to be paid by said terminal company, the interest upon its bonds or other obligations issued under the provisions of this act as the same shall become payable, and a dividend, not to exceed four per cent. per annum, upon its capital stock. Each of said railroad companies shall pay for such use of said station and facilities in the proportion in which it has the use thereof, the same to be fixed by the written agreement of all of said railroad companies before the completion of said station; and in case they fail thus to agree the board of railroad commissioners shall determine such proportions upon the application of said terminal company or of any of the railroad companies. Said proportions as thus fixed, either by agreement or by the decision of the board of railroad commissioners, may be revised and altered from time to time, either by the written agreement

of all of the railroad companies at any time, or by the board of railroad commissioners upon like application, at intervals of not less than three years. The decisions of the board of railroad commissioners fixing said proportions of payments shall be final and binding upon all of said railroad companies, and the payments required to be made by them respectively to said terminal company either by such agreement or decisions shall be deemed a part of their operating expenses, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to compel such payments to be made, either by mandatory injunction or by other suitable process.

Section 11. In order to render the union station and passenger facilities herein provided to be constructed and maintained by the terminal company accessible and convenient for public use, the following changes shall be made by the board of street commissioners of the city of Boston in its streets and public places, to wit:—Lehigh street between South street and Broadway bridge shall be discontinued; Cove street shall be widened to the width of at least one hundred feet, and extended at the width to which it may thus be widened to Summer street extended as required by this act; all of Federal street between Essex street and Federal street bridge which is not embraced within land which the terminal company is authorized to take, or which is not included in the above widening or extending of Cove street, shall be discontinued; Summer street shall be extended at least one hundred feet in width from Purchase street to the harbor commissioners' line; Dorchester avenue shall be extended over Federal street bridge, and thence laid out at a width of ninety-two feet, upon the land which the terminal company shall convey to the city without compensation, substantially parallel with the harbor commissioners' line, to Summer street so extended, and said terminal company shall convey in fee to

the city such of its land acquired under this act as may be required by said street commissioners for said widening and extension of Cove and Summer streets, at its actual reasonable cost to said terminal company; Albany street and Broadway, and the bridges thereof over the Boston and Albany tracks, shall be changed so as to enable the two southerly main tracks and two additional main tracks south of them to be extended thereunder to the grounds of the terminal company. Said board of street commissioners shall discontinue, widen, and lay out said streets in such manner as may be approved by the mayor, and said city shall construct said streets and make said changes in said bridges as above-specified: *provided, however,* that the terminal company shall construct a bridge for the accommodation of foot passengers or a subway from the end of the new Cove street to meet Dorchester avenue at a convenient place, as determined by the railroad commissioners and street commissioners, sitting jointly, whenever said commissioners deem it necessary. The supreme judicial court or any justice thereof shall have jurisdiction in equity to enforce the provisions of this section.

Section 12. Said terminal company and the city of Boston may each release to the other any land which may be necessary for the uses of said terminal company, or for public ways or places respectively, upon such terms as may be agreed upon between the trustees of the terminal company and the mayor and the board of street commissioners of said city; and said railroad companies may convey to each other any land or interest in land in Boston owned by them respectively, which it may be found proper to transfer for convenience in the approach to or use of the station and grounds of said terminal company.

Section 13. For the purpose of paying any expenses incurred by the city of Boston in carrying out the provisions of this act the city council of said city may from time

to time, on the request of the mayor, authorize the city treasurer to issue notes, bonds or scrip of said city to the amount specified in any such request, for a term or terms not exceeding thirty years from the date thereof, provided the sum total of such amounts shall not exceed two million dollars. If the city council shall not within thirty days after a request from the mayor authorize the loan requested, then the city treasurer of said city shall, on the request of the mayor, issue and sell notes, bonds or scrip of said city, for the purpose of paying such expenses, which shall be outside of the debt limit, and shall be for such terms not exceeding five years, as said treasurer shall determine, provided that the amount of said loan shall not exceed two million dollars. All such notes, bonds or scrip, whether inside or outside of the debt limit, shall be negotiable, shall bear interest payable semi-annually, shall be registered or with interest coupons attached, and shall be sold and disposed of in such manner, at such times, at such prices, in such amounts, and at such rates of interest not exceeding four per cent. per annum, as said treasurer may determine; and any premiums received by said treasurer in the sale of any of said notes, bonds or scrip shall, if the notes, bonds or scrip are issued for a term of ten years or more, be paid to the board of commissioners of sinking funds of said city, and be by them placed in the sinking fund for the redemption of the loan created; otherwise they shall be applied to the payment of said notes, bonds or scrip, or to the payment of said expenses, as the mayor may determine.

Section 14. The board of street commissioners of the city of Boston shall, within two years after the completion of said union station, assess upon any real estate in the city of Boston which in the opinion of said board receives any benefit and advantage from the location and construction of said union station, Summer street and Cove street, beyond the general advantage to all real estate in said city,

a proportionate part of one half of the expense incurred by said city therefor, but in no case exceeding such benefit and advantage: *provided, however,* that said terminal company shall convey in fee to said city all the lands easterly of the westerly line of Dorchester avenue extended, without requiring any compensation therefor, and all the land except the piece between Purchase street and Atlantic avenue required for the laying out, widening and extension of Cove street and Summer street, at its actual reasonable cost to said company; and the city of Boston shall assume all such assessments which may be assessed upon land of said terminal company, or of either of said railroad companies, held for railroad purposes. Except as otherwise provided in this section, sections two, three, five, six, seven and eight of chapter fifty-one of the Public Statutes shall apply to assessments under this section.

Section 15. The Union Freight Railroad Company shall, upon the request of the terminal company or of the mayor of Boston, remove its tracks on Federal street as now existing, and relocate and maintain the same on Dorchester avenue as extended under this act, Summer street extended, or on Cove street and Summer street to Atlantic avenue, or on either of said routes, as they are or shall be established and constructed under the provisions of this act, with the same powers and privileges and subject to the same duties, restrictions and liabilities now existing as to said tracks as located in their present location, upon such locations and in such manner as may from time to time be approved by the mayor, and such relocations thereof shall be filed in the office of the city clerk. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

Section 16. The West End Street Railway Company shall, upon the request of the terminal company or of the

mayor of Boston, remove its tracks on Federal street as now existing between Summer street and Federal street bridge, and relocate and maintain the same, with all necessary turn-outs and connections on Summer street as extended, on Dorchester avenue as extended and on Cove street as widened and extended under this act, upon such locations and in such manner as may be from time to time approved by the mayor; and such relocations thereof shall be filed in the office of the city clerk. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

Section 17. The New England Railroad Company, for the purpose of connecting its road with the union station herein authorized to be constructed, may extend its road from a point in the city of Boston as near the northerly end of its South Bay drawbridge as it may find practicable, to said terminal company's grounds, and for that purpose may purchase or otherwise take in fee a strip of land not exceeding thirty feet in width through the land and location of the Old Colony Railroad Company, parallel to its main tracks as they may be then located, subject however to the right of the Old Colony Railroad Company to cross the same; and the New England Railroad Company, the Old Colony Railroad Company and the Boston and Providence Railroad Corporation may jointly or separately construct such bridges across Fort Point channel as may be required for the adequate connection of their roads with each other and with the grounds of the terminal company, the plans thereof to be approved by the harbor and land commissioners; and said New England Railroad Company may use the proceeds of bonds issued under its mortgage made the second day of September in the year eighteen hundred and ninety-five, and recorded with Suffolk county deeds on the twelfth day of September in the year eighteen

hundred and ninety-five, to pay any expenses incurred by it under the provisions of this act.

Section 18. The Boston and Providence Railroad Corporation, for the purpose of connecting its road with the union passenger station hereby required to be constructed, may extend its road from a point at or near Dartmouth street to said terminal company's grounds, and thus abolish the grade crossing of its road and the road of the Boston and Albany Railroad Company, and for that purpose may purchase or otherwise take in fee within seven years after the completion of said union passenger station, or within such further time as said corporations may with the approval of the railroad commissioners agree, a strip of land on the southerly side of and adjacent to the main tracks of the Boston and Albany Railroad Company as they shall be then established, not exceeding one hundred feet in width; but it shall not take any land of the Boston and Albany Railroad Company within seven feet of the main tracks of the railroad of that company as then existing, without the consent of the directors of that company. And for the purpose of providing a station and facilities for passengers and public accommodation as hereinafter provided, in substitution for its present passenger station and facilities at Park square, which such change of its road to enable it to use the union station will require to be abandoned, the Boston and Providence Railroad Corporation may purchase, or otherwise take in fee, any land within the following limits, to wit:—Bounded by land of the Boston and Albany Railroad Company, Columbus avenue, and Buckingham, Dartmouth, Harwich and Yarmouth streets, and the land now of the Boston and Providence Railroad Corporation, and any other land adjacent thereto, within such limits as the board of railroad commissioners may upon hearing in writing prescribe; and said corporation shall file a location of the land hereinbefore authorized to

be taken by it, or of so much thereof as it then deems it necessary to take, in the registry of deeds for the county of Suffolk, within three months after the plans for such station and facilities are approved as hereinafter provided, and shall thereupon, either alone or with the Boston and Albany Railroad Company, if they so agree, proceed with all reasonable diligence to the construction of a passenger station thereon as herein provided.

SECTION 19. The Boston and Providence Railroad Corporation shall, within six months after said terminal company files its first location of land herein authorized to be taken for the construction of a union passenger station, prepare plans and specifications for the construction of a passenger station and approaches thereto and facilities for passengers and public accommodation, which shall be an adequate substitute for its present passenger station and facilities at Park square, and adequate for the business to be accommodated, and of such construction as may be best adapted for the accommodation of the railroad and the public, exhibiting its form, dimensions of walls, rooms, and partitions and arrangements, and its location with reference to the adjacent streets and to the tracks of all railroad companies located or proposed to be located in the vicinity thereof, and any projection over adjacent streets, so far as practicable, and shall submit said plans when completed to the mayor of Boston for his approval, who shall forthwith approve or disapprove them in writing. The Boston and Providence Railroad Corporation shall then at once submit said plans to the board of railroad commissioners for its approval, and said board, after notice to the railroad companies and to the mayor of Boston, and a hearing, shall approve the plans, or order such changes thereof as in their judgment the safety and convenience of the public and the interests of the railroad companies require. Said station, approaches and facilities shall be constructed and

provided by the Boston and Providence Railroad Corporation according to the plans thus approved by the board of railroad commissioners, or as the same may be changed as hereinafter provided, and the supreme judicial court or any justice thereof shall have jurisdiction in equity to enforce the provisions of this section. But the Boston and Providence Railroad Corporation may from time to time propose to the mayor of Boston any changes in the plans for said station, approaches and facilities, and the mayor shall forthwith approve or disapprove such changes in writing, and the corporation shall then at once submit such changes to the board of railroad commissioners who, after notice to the mayor and the railroad companies, and a hearing, shall approve the same, or order such modifications thereof as in their judgment the safety and convenience of the public and the interests of the railroad companies require.

SECTION 20. The Boston and Providence Railroad Corporation and its lessees, upon the completion of said union station and of the station or stations herein required to be constructed near Dartmouth street, shall abandon the use of their present station in Park square for railroad purposes, and their railroad northerly of the crossing of the railroad of the Boston and Albany Railroad Company near and easterly of Dartmouth street, and the board of street commissioners of the city of Boston shall lay out, and said city shall construct, suitable approaches to said station or stations to be constructed near Dartmouth street, in such directions and at such grades as said board shall deem the public convenience and necessity require, and as the mayor of said city shall approve.

SECTION 21. The Boston and Albany Railroad Company shall contract with the Boston and Providence Railroad corporation and with its lessees for the construction or common use of said station and facilities, or for the con-

struction and use of a joint station at or near said point, in accordance with plans and specifications to be prepared and approved in the manner herein-above provided for the preparation and approval of plans for the construction of a station by the Boston and Providence Railroad Corporation, or if it does not so contract, then upon the completion of the union passenger station it shall construct and open for public use a station or stations adequate for the accommodation of the public, at some point or points near Dartmouth street, and for that purpose it may purchase or otherwise take in fee any land within the following limits, to wit: Bounded southerly by the location of the Boston and Albany Railroad Company westerly by Dartmouth street, northwesterly by land of the heirs of Eben D. Jordan, Trinity place, and land of the Massachusetts Institute of Technology, and easterly by the westerly line of Clarendon street extended. And whenever a station upon the tract of land herein above-described is opened for use, the Boston and Albany Railroad Company may discontinue its present passenger stations at Columbus avenue and Huntington avenue. The supreme judicial court or any justice thereof shall have jurisdiction in equity to compel compliance with the provisions of this section.

Section 22. The Boston and Albany Railroad Company, within six months after the completion of said union station, shall abandon its present location from the southerly line of Kneeland street northerly to Beach street, and shall remove its tracks from the present grade crossing on Kneeland street between Lincoln street and Albany street, and, for the purpose of extending its terminal facilities may, from time to time, purchase or otherwise take in fee, the whole or any part of the tract of land bounded and described as follows: Northerly by Kneeland street between the westerly side of Utica street and the easterly side of South street; easterly by the easterly line of South street

to Lehigh street; thence across and by the westerly line of South street to the southerly line of Harvard street, so-called; southerly by the south line of Harvard street, so-called, to the westerly line of Utica street; and westerly by said line of Utica street to Kneeland street; and may discontinue and occupy for its purposes all streets and rights of way embraced within said limits, and may also take and discontinue any public or private ways within the tract of land bounded by Kneeland street, Albany street, Broadway, Lehigh street and South street.

SECTION 23. The laws of the Commonwealth relating to the taking of lands for railroad purposes, and the location and construction of railroads, and the assessment of damages occasioned thereby, shall be applicable to and govern the proceedings in the taking of land hereby authorized to be taken by said terminal company or by any railroad company, except that the locations shall be filed in the registry of deeds, as herein provided, and in case the parties, including mortgagees, cannot agree upon said damages, upon petition of any such party filed within one year after the taking of the land, in the clerk's office of the superior court for Suffolk county, the same shall be assessed by a jury in that court. But if any owner of land taken and all mortgagees thereof shall elect to have the damages assessed by a commission of three disinterested persons appointed by the court, the court shall appoint such commission to assess said damages, and their award, or the award of the major part of them, when made and accepted by the court, shall be final, unless either party shall within sixty days thereafter appeal therefrom, in which case the damages shall be assessed by a jury in that court.

SECTION 24. No owner of any land taken under the provisions of this act shall be required to vacate his premises until three months after a location has been filed, taking the land, and the Boston Gas Light Company shall not be

required to vacate the whole or any part of the premises now owned or occupied by it until six months after such filing, or until after such further time, not exceeding fifteen months from the time of such filing and notice, as the board of railroad commissioners and the board of gas and electric light commissioners, who are for this purpose constituted a joint board, may, upon the application of either the railroad company or the gas company, made at any time after the passage of this act, after hearing, prescribe in writing.

SECTION 25. The terminal company shall pay a franchise tax to the Commonwealth upon the true market value of its capital stock, without any deduction whatever, but its real estate required by this act to be used by said railroad companies shall be assessed to and the taxes thereon shall be paid by said railroad companies, and in the assessment of franchise taxes upon said railroad companies each of them shall be deemed to be the owner of said real estate in the proportion in which it then has the use thereof under this act.

SECTION 26. This act shall take effect upon its passage.

Approved June 9, 1896.

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No. 1315 (11)

Supreme Court of the United States.

OCTOBER TERM, 1944.

IN THE MATTER OF

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, DEBTOR.

THE COMMONWEALTH OF MASSACHUSETTS,
THE CITY OF BOSTON,
WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, TRUSTEE,
THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,
Petitioners.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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of Massachusetts.

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Supreme Court of the United States.

October Term, 1944.

In the Matter of

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor.

THE COMMONWEALTH OF MASSACHUSETTS,

THE CITY OF BOSTON,

WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee,

THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,

Petitioners.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Commonwealth of Massachusetts, in this matter gravely affecting its sovereignty, in relation to the first eleven questions presented by the petition, respectfully submits the following:

I.

The questions presented arise under Section 77 of the U.S. Bankruptcy Act (11 U.S.C. § 205), particularly subdivision (b), relative to the formulation of plans of reorganization, and subdivision (f), relative to carrying out of such plans after confirmation.

The pertinent language of subdivisions (b) and (f) reads as follows, with emphasis supplied:

> "(b) A plan of reorganization . . . (5) shall provide adequate means for the execution of the plan, which may include the transfer of any interest in or control of all or any part of the property of the debtor to another corporation or corporations, the merger or consolidation of the debtor with another corporation or corporations, the retention of all or any part of the property by the debtor, the sale of all or any part of the property of the debtor either subject to or free from any lien at not less than a fair upset price, the distribution of all or any assets, or the proceeds derived from the sale thereof, among those having an interest therein, the satisfaction or modification of any liens, indentures, or other similar interests, the curing or waiver of defaults, the extension of maturity dates of outstanding securities, the reduction in principal and/or rate of interest and alteration of other terms of such securities, *the amendment of the charter of the debtor*, and/or the issuance of securities of either the debtor or any such other corporation or corporations for cash, or in exchange for existing securities, or in satisfaction of claims or rights or for other appropriate purposes; and may deal with all or any part of the property of the debtor; may reject contracts of the debtor which are executory in whole

or in part, including unexpired leases; and may include any other appropriate provisions not inconsistent with this section."

"(f) . . . Upon confirmation of the plan, the debtor and any other corporation or corporations organized or to be organized for the purpose of carrying out the plan, shall have full power and authority to, and shall put into effect and carry out the plan and the orders of the judge relative thereto, under and subject to the supervision and the control of the judge, *the laws of any State or the decision or order of any State authority to the contrary notwithstanding.*

II.

The foregoing provisions were held by the Circuit Court of Appeals to authorize the plan, *ex proprio vigore*, to abrogate the provisions of chapter 516 of the Massachusetts act of 1896,[1] requiring the New York, New Haven and Hartford Railroad and the Old Colony Railroad to use the South Station for all of their terminal passenger business in Boston, and other statutory provisions requiring those railroads to maintain passenger stations and service in Massachusetts, especially Massachusetts General Laws, c. 160, §§ 128, 129[2]; at the same time preserving to said railroads the right to operate passenger service elsewhere in the Commonwealth and freight service on the very lines

[1] Appears in appendix to petition, pp. 51-67.

[2] Said sections read as follows:

"SECTION 128. A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station, unless it is relocated under the following section, nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the

on which passenger service is abandoned, as well as elsewhere in the Commonwealth.

Subdivision (b), clause (5), was inserted by the amendment of August 27, 1935, c. 774, 49 Stat. 911. In the original act of 1933, 47 Stat. 1474, first inserting § 77 in the Bankruptcy Act, clause (5) appeared as clause (3) of said subsection. Most of the provisions of clause (5) appeared in said clause (3), but the words "the amendment of the charter of the debtor" were inserted by the act of 1935.

Subdivision (f) replaces in substance the provisions of subdivision (h) of § 77 as they appeared in the original act of 1933. The underlined provisions contain the only language relied upon to support the construction of § 77 as authorizing the abrogation of state laws by a plan of reorganization *ex proprio vigore*.

The words in subdivision (b) "the amendment of the charter of the debtor" would not ordinarily be construed as referring to such exercises of the police power as Massa-

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written approval of the department after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon."

"SECTION 129. A railroad corporation may relocate passenger stations and freight depots, with the written approval of the department and of the board of aldermen of the city or the selectmen of the town where such stations or depots are situated."

These sections also appear in appendix to petition, pp. 50-51.

That the foregoing provisions are regarded by the legislature of Massachusetts as still in force is shown by Massachusetts General Laws, c. 159, § 16A, inserted by Chapter 243 of the Acts of 1938, as follows:

"SECTION 16A. The department before authorizing any railroad to discontinue or abandon any of its lines, stations or other service, may consider, in addition to other facts, the revenues of said railroad from all sources."

This section also appears in appendix to petition, p. 50.

chusetts General Laws, c. 159, §§ 16[3], 16A, and c. 160, §§ 128, 129, as part of the charter of the debtor. And it would require a broad construction of them to include as part of the *charter* chapter 516 of the Acts of 1896.

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[3] The first few lines of General Laws, c. 159, § 16, contain a broad grant of power to the Massachusetts Department of Public Utilities. This section reads as follows:

> "SECTION 16. If the department is of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the department shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby. The department may after such a hearing, order any railway company to build and operate any just and reasonable extensions of its lines for which it may have been or may be granted locations and order from time to time that a railroad company shall operate its lines, of standard gauge, or such parts thereof as the department shall prescribe, by electric power instead of steam power, and in its order shall prescribe the time within which the work of electrification shall be done. Before making such order, the department shall consider the relative importance and necessity of the changes in any specific regulations, practices, equipment and appliances proposed to be included therein and of other changes which may be brought to its attention in the course of the hearing, the financial ability of the carrier to comply with the requirements of the order, and the effect of the carrier's compliance therewith, upon its financial ability to make such other changes, if any, as may be deemed by the department of equal or greater importance and necessity in the performance of the service which the carrier has professed to render to the public. Every such common carrier shall obey every requirement of every such order so served upon it, and do everything necessary or proper in order to secure absolute compliance with every such order by all its officers, agents and employees."

This section also appears in appendix to petition, pp. 49-50.

Also, these words are not inconsistent with an intention that application be made to the state legislature to amend the charter of the debtor in a case where such amendment was deemed advisable.

As to the words in subdivision (f), "the laws of any state or the decision or order of any state authority to the contrary notwithstanding," it must be remembered that subdivision (f) relates only to the operation of a plan already confirmed. Subdivision (b), not (f), is the one which states what the plan may contain.

Subdivision (b) states that a plan may authorize the issue of securities. It may well be that under subdivision (f) securities might be issued exempt from the laws of any state or the supervision of any state tribunal; but this would not justify the abrogation of laws relating to passenger stations or orders of the Department of Public Utilities relative to passenger service. As suggested on page 25 of the petition, it would not authorize the abrogation of statutes relative to the abolition of grade crossings or the taxation of railroad corporations.

III.

To give to subdivisions (b) and (f) the construction given them by the Circuit Court of Appeals would violate the established principle that the intention of Congress to exclude states from exercising their police power must be clearly manifested. It is not necessary to cite again the authorities in support of this proposition quoted in the text and cited in the notes on page 24 of the petition.

Furthermore, the National Bankruptcy Act is primarily an act to relieve debtors while protecting so far as possible the rights of creditors. It should not lightly be construed as an act taking away the regulatory powers of state legislatures and state administrative bodies over railroads, and

giving them to a District Court of the United States, sitting in bankruptcy, as is done if that court is authorized to approve a plan which abrogates state laws.

Also the reliance placed by the Circuit Court of Appeals upon certain dicta in the case of *Palmer* v. *Massachusetts*, 308 U.S. 79, at pages 88 and 89, indicates that this Court, and not the Circuit Court of Appeals, should finally decide the issues directly raised in this case.

IV.

In view, therefore, of the novelty of the statutory construction enunciated by the Circuit Court of Appeals and necessary to support its decision, the reliance by that court upon dicta of this Honorable Court in a case in which the issue was not directly raised, the doubtfulness of the construction reached, the fundamental principles of statutory construction which are ignored in reaching it, and the importance to this Commonwealth and other states of the decision of the Circuit Court of Appeals as affecting their sovereignty, it is respectfully submitted that this Honorable Court should grant the petition and itself hear and decide the questions of law involved.

Respectfully submitted,

THE COMMONWEALTH OF MASSACHUSETTS,

By its Attorneys,

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Assistant Attorney General.

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October Term, 1944

No. 1316

In the Matter of The New York, New Haven and Hartford Railroad Company, Principal Debtor, and Old Colony Railroad Company, Subsidiary Debtor.

HOMER N. CHAPIN, WALTER A. PAXTON, AND SAMUEL S. HALL, JR., AS EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS, *Petitioners,*

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, *et als., Respondents.*

PETITION OF INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Dated Richmond, Va., May 22, 1945.

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Abbreviations

The following abbreviations as used in this brief are intended to have the respective meanings stated below unless the context indicates a different meaning.

"Court" or "District Court"—The District Court of the United States for the District of Connecticut.

"Massachusetts Court"—The District Court of the United States for the District of Massachusetts.

"Commission"—Interstate Commerce Commission.

"Debtor"—New York, New Haven and Hartford Railroad Company.

"Debtor railroads"—New York, New Haven and Hartford Railroad Company and Old Colony Railroad Company.

"New Haven"—New York, New Haven and Hartford Railroad Company.

"Old Colony"—Old Colony Railroad Company.

"Boston and Providence"—Boston and Providence Railroad Company.

"New England"—The New England Railroad Company.

"Boston Terminal" or "Terminal Company"—The Boston Terminal Company.

Citations to Record

Citations to the Record are to the abbreviated Record prepared and filed herewith under Stipulation of Counsel, Rec. pp. 244-249.

Supreme Court of the United States

October Term, 1944

No. .....

In the Matter of The New York, New Haven and Hartford Railroad Company, Principal Debtor, and Old Colony Railroad Company, Subsidiary Debtor.

HOMER N. CHAPIN, WALTER A. PAXTON, AND SAMUEL S. HALL, JR., AS EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS, *Petitioners,*

vs.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, *et als., Respondent.*

PETITION OF INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Homer N. Chapin, Walter A. Paxton and Samuel S. Hall, Jr., as Executive Committee for Institutional Group for Boston Terminal Bonds, (a group formed under §77(p) of the Bankruptcy Act of insurance companies holding bonds of the Boston Terminal Company), respectfully petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order entered by said Court in the above pro-

ceeding on January 30, 1945 affirming in part and reversing in part an order of the District Court of the United States for the District of Connecticut entered on March 6, 1944 approving a plan of reorganization for the New York, New Haven and Hartford Railroad Company, principal debtor and the Old Colony Railroad Company, subsidiary debtor.

Opinions Below

Opinions of District Court—Opinions October 30, 1939 (not reported)*; December 21, 1943 on Fourth Plan, 54 Fed. Supp. 595**; and of March 6, 1944 approving Fifth Plan, 54 Fed. Supp. 631†. Opinions of Circuit Court of Appeals—January 2, 1945, and January 23, 1945, 147 F. (2d) 40.††

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USC §347(a)), and Section 24(c) of the Bankruptcy Act (11 USC §47(c)). The order of the Circuit Court of Appeals for the Second Circuit was entered on January 20, 1945.‡ Time for filing the petition was extended to May 31, 1945 by order of March 21, 1945.‡‡

Statutes

The matter herein presented involves the consideration and construction of an Act of the General Court of Massachusetts (Mass. Acts and Resolves 1896, Chapter 516) printed in full in the Record*†; and Section 77 of the National Bankruptcy Act (11 USC §205).

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*Rec. p. 6159.
**Rec. p. 10695.
†Rec. p. 11024.
††Rec. p. 11525.
‡Rec. p. 240.
‡‡Rec. p. 167.
*†Rec. p. 243.

Statement of the Matter Involved

1. *The Boston Terminal Company*—Prior to the creation of Boston Terminal there had been five railroads operating trains from the South and West into, and authorized to do a passenger business in, the City of Boston. They were the Boston and Albany*, New England, Old Colony, Boston and Providence and New Haven. In 1888 Old Colony had leased the Boston and Providence for a period of 99 years. In 1893 the New Haven had leased the Old Colony, (including its unexpired leasehold interest in Boston and Providence), for a period of 99 years. In or about 1895 the New Haven had acquired stock control of New England, which was subsequently merged into New Haven. Each of the five railroad companies named except the New Haven owned lines of railroad extending into and terminating in the City of Boston. The New Haven operated its trains into Boston over the tracks of its leased or controlled lines aforesaid. The respective passenger terminals of the lines mentioned were widely separated, and were reached by tracks crossing streets and other tracks at grade. These conditions resulted in danger and inconvenience to the public. This led to a movement, under the leadership of the Mayor of Boston with the cooperation of the New Haven, for the creation of a joint terminal "to provide adequate terminal facilities for the several railroad companies" named in the act, and "for the accommodation of the public," and to require all of these railroad companies to use the same for "all of their terminal passenger business in Boston".**

*See Massachusetts Acts 1872, Chap. 143 as to Old Colony; 1831 Chap. 56 as to Boston and Providence; 1895 Chap. 484 as to New England; 1867, Chap. 270 as to Boston and Albany; 1872 Chap. 171 as to New Haven; also see Mass. Acts 1905 Chap. 252 authorizing merger of New England with New Haven; Mass. Acts 1872, Chap. 143; Mass. General Law, Chap. 159, §16, 16a; Chap. 160, §128.

**For history of the Boston Terminal and the purposes thereof see

To this end the Boston Terminal Company (hereinafter called Terminal Company) was incorporated by special act of the Legislature of Massachusetts in 1896* to construct and operate a passenger terminal in the City of Boston to be used jointly by the five railroads named in the Act and "for the accommodation of the public in connection therewith."

The plan embodied in the Act for financing, construction and operation of the terminal may be briefly summarized as follows:

(a) The City of Boston was required to expend not exceeding $2,000,000 (§13) in closing and opening streets and providing other facilities to remove existing hazards of grade crossings and to provide access to the terminal.

(b) Bonds were to be issued by the Terminal Company in an aggregate amount to be approved by the State Board of Railroad Commissioners (now Department of Public Utilities) to bear interest at not exceeding 4% and to be approved investments for savings institutions from date of issue (Sec. 4).**

(c) Stock of the Terminal Company was to be issued in the aggregate amount of $500,000 (less than 1/30 of the cost of the terminal) (Sec. 2). Each of the railroad companies aforesaid specifically named in Sec. 2 of the Act was authorized to, and did, subscribe for one fifth, or $100,000

*Rec. p. 167.

**Under this provision bonds were issued from time to time, in the aggregate principal amount of $15,500,000 of which $13,992,000 principal amount of 3½% bonds mature February 1, 1947, and $1,163,000 principal amount of 4% bonds mature July 1, 1949. Petitioners are holders of over $800,000 principal amount of these bonds.

Baker—*"Formation of the New England Systems"* 37 Harvard University Press, Chaps. 3 and 4; Statement of Hon. Josiah Quincy, Mayor of Boston, before the Committee considering the Massachusetts Act of 1896, Mass. Public Library.

par value, of this stock. Dividends upon this stock were limited to 4%.

(d) The management of the Terminal Company was vested in a board of five "Trustees," one to be appointed by each of the railroads named in Sec. 2 of the Act (Sec. 3); but all plans for construction of the terminal were subject to approval of the Mayor of Boston and the Board of Railroad Commissioners of the State (now Department of Public Utilities), and all rules and regulations for the operation thereof were subject to like approval (Secs. 6 and 8).

(e) The five railroad companies named in Section 2 of the Act were mandatorily required (1) to use the Terminal "for all of their terminal passenger business in Boston instead of the passenger terminals now used by them" (Sec. 9); (2) to pay therefor "in monthly instalments", amounts necessary to pay all operating expenses, taxes and bond interest of the Terminal Company together with an amount equal to not exceeding 4% on its stock, and it was expressly provided that such payments shall be "deemed a part of their operating expenses" (Sec. 10); (3) in event of foreclosure of any mortgage given by the Terminal Company to secure its bonds, to pay any deficiency which might result therefrom "so that full payment of the principal and interest of the bonds issued under the provisions of this Act by the Terminal Company shall in no event fail" (Sec. 4); and (4) original jurisdiction was conferred by the Act upon the Supreme Judicial Court of Massachusetts to enforce by summary proceedings the use of the terminal, the payments so required to be made, and other provisions of the Act.

(f) The required payments were to be made by the several railroads on basis of user. In event of their inability to agree, the several proportions were to be fixed by the State Board of Railroad Commissioners (now Department of

Public Utilities). By order of this tribunal of July 17, 1931, on petition of the New Haven, these proportions were fixed at 70% for the New Haven, (then successor by merger to the New England, and lessee of Old Colony and Boston and Providence) and 30% for the New York Central, then lessee of Boston and Albany.* This order is still in force.

Each of the five railroads named subscribed its proportions of the stock. The terminal was completed and use thereof begun in 1899 which has since continued. Payments under the Act and the order aforesaid were made by the New Haven up to the time of the institution of these proceedings; thereafter by the Trustees in Bankruptcy until November 1939, when payments on account of interest and taxes of the Terminal Company were discontinued by administrative order of the District Court as hereinafter stated.

2. *Bankruptcy Proceedings*—Bankruptcy proceedings of New Haven were instituted in October 1935 and Trustees appointed. There was then no default as to the obligations of the terminal. There were no executory contracts or leases between the Terminal and the user railroads.

In June 1936 the Trustees of New Haven disaffirmed the lease of Old Colony. A majority of the stock of Old Colony was owned by New Haven. It was immediately petitioned into bankruptcy in the New Haven proceedings. The same persons who were trustees of the New Haven were also appointed trustees for Old Colony. The trustees of the New Haven were directed to operate Old Colony for account of the lessor or its trustees.** Operation of the Boston and Providence was continued by the New Haven trustees for account of Old Colony under the lease to Old Colony until July 1938. The Court then directed the trus-

*Rec. p. 199.

**Rec. p. 7870.

tees of Old Colony to disaffirm the Boston and Providence lease. By the same order the Court directed that the trustees of the New Haven should continue to operate Boston and Providence for account of the lessor but without expense to the New Haven.* The Boston and Providence was then petitioned into bankruptcy in the U. S. District Court for Massachusetts. The proceedings are still pending.

On October 30, 1939 the Court directed the trustees of the New Haven to discontinue advances to Old Colony and Boston and Providence for payment of interest and taxes of the Terminal Company under the Massachusetts Act of 1896. In its opinion on which this order was based, the Court held that the obligations of the Massachusetts Act of 1896 were imposed upon the New Haven only "as lessee" of the Old Colony; that the disaffirmance of that lease relieved the New Haven of all obligations under the Act (except as to New England which was not at the moment using the terminal) including the charges for use of the Terminal prescribed by Sec. 10 thereof.** On appeal the order of the District Court was reversed, but the Circuit Court of Appeals declined to decide the question as to the obligations of New Haven under the Act of 1896.† On *certiorari* to this Court the order of the District Court was affirmed as an "administrative order" suspending advances by the New Haven, but this Court refused to decide, or to express any opinion as to, the obligations of New Haven under the Act of 1896.††

The Terminal Company was then petitioned into bankruptcy in the United States District Court of Massachusetts by certain of its bondholders on November 3, 1939. A trustee was duly appointed who has since administered the

*Rec. pp. 7870, 7876.

**Rec. pp. 6151, 6152, 6159.

†*Webster and Atlas Bank* v. *Palmer*, 111 Fed. (2) 215.

††*Palmer* v. *Webster and Atlas Bank*, 312 U. S. 156, 168.

property. These proceedings are still pending. No plan of reorganization of the Terminal Company has been reported.

3. *Reorganization Proceedings*—In March 1940, Division 4 of the Commission reported a plan of reorganization for the New Haven excluding the Old Colony therefrom.* On rehearing before the full Commission that body reported a modified plan including both New Haven and Old Colony.** Neither of these plans proposed any modification of obligations of the debtor railroads under the Act of 1896.

In the hearing before the District Court on the Second Plan the chief question at issue was as to whether the New Haven should acquire Old Colony, and if so, on what terms. The Court "informally" appointed a committee to canvass the situation and see if the differences between Old Colony and New Haven interests could be adjusted. This committee consisted of counsel for certain New Haven and Old Colony interests and an Assistant Attorney General of Massachusetts, all of the parties acting "personally" and not "officially".†

Some three months after this hearing but before any decision thereon, the Committee "handed" to the Court a report in which it was proposed, for the first time in this proceeding that the obligations of the debtor railroads under the Act of 1896 should be so modified that the obligations on account of interest on terminal bonds should be reduced from their proportion $536,240 to their proportion of $275,000 per annum, effective from 1939 when the last interest payment had been made. Neither the Bankruptcy Trustee of the Terminal Company, the trustee in its mortgage nor any of its bondholders were parties to the New

*Rec. pp. 7863, 7990.

**Rec. p. 8037.

†Rec. pp. 8958, 8963, 9013, 9015.

Haven proceeding.* They were not consulted as to this proposal.

In December 1941 the Court disapproved the plan of the Commission. Without any hearing on the report of the committee it held that some reduction should be made in the obligations of the debtor railroads to the Terminal Company under the Act of 1896, attached the report of the Compromise Committee to its opinion and "commended" it for the consideration of the Commission.**

Upon return of the proceedings to the Commission further hearings were held before examiners on February 17-19, 1942. At the conclusion of these hearings the record was closed except that it was kept open for the purpose of receiving further proposals from the so-called Compromise Committee appointed by the Court.† The terminal interests aforesaid were not parties to the proceeding and did not appear at this hearing.

In April 1942 the Committee, without notice to anyone, submitted to the Commission a report in which certain Old Colony and New Haven interests joined.†† By this Joint Report it was proposed (1) that not only should the payments of the debtor railroads on account of interest on Boston Terminal bonds be reduced from their proportion of $536,240 to their proportion of $275,000 per annum effective from 1939, as proposed in the previous report to the Court; but in addition thereto it was now proposed for the first time (2) that the *obligation to use* the terminal as

*The trustee in the terminal mortgage had intervened specially in 1939 to be heard upon and to appeal from Order 398 suspending advances by New Haven for payment of interest and taxes of the Terminal Company, but this intervention was specifically limited to that one order.

**Rec. pp. 8923, 8958.

†Rec. p. 9761.

††Rec. p. 207.

mandatorily required by Section 9 of the Act of 1896, and to make the payments therefor, as required by Section 10 of said Act, should be *entirely abrogated,* with the option to the *debtor railroads* to continue the use of the terminal and to make payments therefor on the reduced basis proposed in the report if, and so long as, they elected to do so; (3) to *abrogate entirely* the obligation imposed upon the user railroads by Section 4 of the Act to pay any deficit on the bonds of the Terminal Company in event of foreclosure; and (4) to give to the user-railroads the revenues of the Terminal Company from rentals and concessions as a credit against expenses of the Terminal which they were required to pay under §10 of the Act. None of the terminal interests were parties to the proceeding at that time. No hearing was had on these proposals before the Commission. In its Report and Order approving its Third Plan, however, the Commission adopted those proposals *in totidem verbis* as a part of its plan.

Upon the publication of this plan petitioners promptly organized the Institutional Group for Boston Terminal bonds to protect their interest in the premises, and filed a petition of intervention before the Commission. They were admitted as parties. Within the statutory period of sixty days* they filed before the Commission, on December 4, 1942, their petition urging the illegality and inequity of the plan, the inadequate, incomplete and misleading character of the evidence as to the terminal, and prayed leave to produce evidence and to be heard upon the plan in so far as it dealt with their rights and interests.** In July 1944 the Commission rendered its Fourth Supplemental Report and Order in which it declined to reopen the matter for hearing on the proposals of the Joint Report, and denied leave to petitioners to introduce evidence or to be heard, but again adopted in

*Section 77(d), 11 USC. § 205.

**Rec. p. 53.

terms the proposals of the Joint Report as to the modification or abrogation of the obligations of the debtor railroads under the Act of 1896.* The plan was immediately certified to the Court.

Joint and several objections to the plan and claims for equitable treatment were duly filed by petitioners and various other parties to the proceeding.** Petitioners and other Terminal interests also filed motions for leave to introduce evidence before the Court in support of their objections and claims and then tendered in open court offers of proof setting forth what they desired to prove, showing the relevancy and materiality thereof. The Court refused to receive any evidence but allowed the offers of proof to be filed.†

On December 21, 1943 the court handed down its opinion on the Fourth Supplemental Plan.†† It held that various essential provisions of the plan were illegal or inequitable and could not be approved; but also held that the Court had a right to modify these provisions including a redistribution of securities to conform to such modification, and then to approve the plan as modified, without a return of same to the Commission. It also undertook to "construe" the provisions of the plan for the absolute modification or abrogation of the obligations of the debtor railroads under the Act of 1896 into an offer which the Terminal Company or its Bankruptcy Trustee could elect to accept or reject, and held that the decree would define the time within which this option might be exercised. There was no suggestion of an "offer" in the Plan of the Commission. This was therefore a radical departure from or modification of the Plan as approved and certified by the Commission.

*Rec. pp. 10123, 10158-10163.

**Rec. p. 10383.

†Rec. p. 11011.

††54 Fed. Supp. 595, Rec. p. 10695.

In concluding its opinion the Court said:

> ". . . if the Commission after reading my opinion shall wish of its own motion to file any supplemental report or order whether adapted to confirm my proposed action or require action in another direction, I shall be glad to shape my decree accordingly."*

The Court overruled a motion for an order disapproving the Fourth Plan and returning the proceedings to the Commission as required by Section 77(e).** Petitioners then filed with the Commission their objections to any further proceedings before the Commission until the Fourth Plan which the Court had held to be illegal and inequitable, was disapproved by the Court and the proceedings returned for further action of the Commission; and until hearings were then had thereon as required by §§77(e) and (d).† These objections were overruled by the Commission.

On February 8, 1944, (about eight months after the Fourth Plan had been certified to the Court), the Commission without return of the proceedings as required by §77(e) and *without notice or hearing to anyone,* approved and certified to the Court a Fifth Plan and order thereon "revoking and superseding" all former orders including that on the Fourth Plan which was still pending before the Court, no order having been entered thereon.†† The Fifth Plan was essentially different from the Fourth Plan. By Section N(1)(a) of the Fifth Plan the Commission again adopted the proposal of the Joint Report for modification of the obligations of the user railroads as to Boston Terminal, but also adopted the construction of the Court

*Rec. p. 10760.
**Rec. p. 10823.
†Rec. p. 69; Rec. p. 10834.
††Rec. pp. 10831, 10923.

"to recognize a right in the Terminal Company such as *a lessor of a lease rejected by Trustees in Bankruptcy* would have to make its own election as to whether it would repossess or would acquiesce in the continued operation of the user railroads under the terms proposed in the plan."* (Italics provided)

Although the Act of 1896 which was the charter of the Terminal Company, was mandatory in its terms requiring the use of the terminal by the debtor railroads and prescribing the terms of such use, and excluded any right of the Terminal Company or the user railroads to contract as to the use or the terms thereof, the Fifth Plan provided in effect that the Bankruptcy Trustee of Terminal Company should within a time to be prescribed by the Commission, either accept the modified terms for such use proposed therein, or reject the same, exclude the user railroads and file claim for damages within two weeks, or be forever barred from asserting any claim for breach of the obligations imposed by the Act of 1896.

Thereupon petitioners filed a written motion to strike the Fifth Plan from the files of the Court upon the grounds (a) that the Commission was without jurisdiction to report or certify the same without disapproval and return of the Fourth Plan as required by §77(e); and (b) that the Fifth Plan had been prepared and certified without notice or an opportunity to be heard to any of the parties in interest as required by Section 77(d).** This motion was overruled.

Petitioners then filed objections and claims for equitable treatment as to the Fifth Plan and moved for leave to introduce evidence before the Court in support thereof.† Leave

*Rec. p. 10847. There was no lease, no legal authority to make one, and the property of the Terminal Company was in possession of and being operated by the Bankruptcy Trustee appointed by the District Court of Massachusetts.

**Rec. p. 10983.

†Rec. pp. 10962, 11007.

to introduce any evidence was denied. Petitioners thereupon filed their further offers of proof which were made a part of the record.* Objections to the plan and claims to equitable treatment were overruled. The Fifth Plan was approved by order of the Court on March 6, 1944.** From this order appeal was duly taken to the Circuit Court of Appeals for the 2nd Circuit.

4. *Action of the Circuit Court of Appeals*—On January 2, 1945 the Circuit Court of Appeals handed down its opinion reversing the order of the District Court as to the claims of certain banks and the treatment of Old Colony bonds and affirming the order as to all other appellants including petitioners.† Petitions to rehear were duly filed by certain of the parties in interest. A joint motion was filed by petitioners and other terminal parties for stay of the mandate pending an application to this Court for writ of certiorari. By order of January 30, 1945 the Court denied the petitions for rehearing, overruled the motion for stay of mandate and remanded the cause "with leave to the District Judge to remand to the Commission all or any portion of the plan if in his opinion it is desirable to have the Commission consider further any provisions of the plan in addition to those affecting Old Colony."††

Questions Presented

1. Were the several acts and proceedings of the Commission (a) in denying to petitioners a hearing upon the proposals contained in the Joint Report of the Compromise Committee and others; (b) in overruling the objections of petitioners to further proceedings before the Commission

*Rec. p. 11011.

**Rec. p. 11050.

†147 F. (2d) 40; Comp. Rec. p. 11525.

††Rec. pp. 241, 242.

unless and until the Fourth Plan was returned to the Commission and further hearings were had thereon; and (c) in reporting the Fifth Plan "revoking and superseding" all previous orders of the Commission while the Fourth Plan was still pending before the Court, and without any hearing as to said Fifth Plan, in violation of the provisions and requirements of Section 77 of the Bankruptcy Act or a denial to petitioners of due process of law?

2. Were the several acts or proceedings of the District Court (a) in failing and refusing to disapprove the Fourth Plan after it had held the same to be illegal and to dismiss the proceedings or return the same to the Commission for further action under Section 77(d); (b) in holding that it had power to modify the Fourth Plan as proposed without a return of the proceedings to the Commission; (c) in receiving and acting upon the Fifth Plan as reported and certified by the Commission, and (d) in refusing to permit petitioners to present evidence and to be heard thereon in support of their objections and claims for equitable treatment as to the Fifth Plan, or any of them, in violation of the provisions and requirements of Section 77 of the Bankruptcy Act, or a denial to petitioners of due process of law under the Fifth Amendment to the Constitution of the United States?

3. Did the rights conferred and duties and obligations imposed upon the user railroads as to Boston Terminal by the Massachusetts Act of 1896 apply to the New Haven as such or only "as lessee" of Old Colony; and did said rights, duties and obligations continue as to the New Haven after the disaffirmance of the lease of Old Colony to New Haven?

4. Were the terms, conditions and provisions of the offer contained in Section N(1)(a) and N(1)(b) of the Fifth Plan unlawful and invalid as being in violation of the

mandatory provisions of the Massachusetts Act of 1896 which were binding alike upon the debtor railroads and the Bankruptcy Trustee of the Terminal Company; and as to the Terminal Company in violation of the provisions of its charter?

5. Did the Commission or the District Court of Connecticut have power under the provisions of Section 77 of the Bankruptcy Act to require the Bankruptcy Trustee of the Terminal Company appointed by and subject to the orders of the District Court of Massachusetts to elect whether to accept or reject the so-called offer contained in the Fifth Plan prescribing terms and conditions as to the user of the Boston Terminal entirely different from those prescribed in the Massachusetts Act of 1896 which constituted the Charter of the Terminal Company; and did the District Court of Massachusetts have power to authorize the Bankruptcy Trustee to exercise said election?

6. Did the provisions of the Massachusetts Act of 1896 imposing upon the debtor railroad companies the duties and obligations set forth therein as to Boston Terminal constitute amendments to the respective charters of the debtor railroads; and if so, did the Commission have power by a plan of reorganization of the debtor railroads in a proceeding under Section 77 of the Bankruptcy Act to further amend said charters to modify or abrogate the said duties and obligations as proposed in the Fifth Plan?

7. Did the provisions of the Massachusetts Act of 1896 imposing upon the debtor railroads the duties and obligations therein set forth constitute an exercise of the police power of the Commonwealth of Massachusetts; and if so, did the Commission and District Court have power by a plan of reorganization in a proceeding under Section 77 of the Bankruptcy Act to modify or abrogate the several

duties and obligations so imposed upon the debtor railroads as to Boston Terminal?

8. Did the provisions of Section 77(f) of the Bankruptcy Act confer upon the Commission any substantive power in the preparation of a plan of reorganization or enlarge the powers of the Commission under sub-section (b) of said Act, and did the Court in this case correctly construe and apply the provisions of said Section 77(f) of the Bankruptcy Act?

9. Could the Commission and the District Court in a proceeding under Section 77 of the Bankruptcy Act exercise powers conferred upon the Commission by the Interstate Commerce Act derived from an entirely different clause of the Constitution; and did the Interstate Commerce Act, even if applicable, confer upon the Commission or the District Court any power or authority by a plan of reorganization under Section 77 of the Bankruptcy Act to modify or abrogate the duties and obligations as to Boston Terminal imposed upon debtor railroads by the Massachusetts Act of 1896?

10. Did the Commission have power by a plan of reorganization of the debtor railroads under Section 77 of the Bankruptcy Act to take from the Terminal Company or its Bankruptcy Trustee, revenues derived from rentals and concessions in the terminal building and give the same to the debtor railroads as a credit against expenses which said debtor railroads were required to pay under Section 10 of the Act of 1896; or did this proposed action constitute a taking of the property of the Bankruptcy Trustee and creditors of the Terminal Company for use of the debtor railroads or their creditors without due process of law and without compensation in violation of the Fifth Amendment to the Constitution of the United States?

11. Was the decision of the court below that the provisions of the approved plan based on, and part of, the compromise arrangement as to Old Colony embodied in the Joint Report of the Compromise Committee and others which was held to be invalid as to bondholders of Old Colony but valid as to Boston Terminal interests, also unlawful and invalid as to Boston Terminal interest and in violation of applicable decisions of this Court?

12. Were the provisions of the approved plan as to the rights and interests of the Bankruptcy Trustee and creditors of the Terminal Company fair and equitable, nondiscriminatory and otherwise in conformity with the requirements of Section 77(e) of the Bankruptcy Act?

Reasons Relied on for Allowance of the Writ

1. *As to questions of procedure.*—Section 77(d) of the Bankruptcy Act requires that before the Commission may report a plan of reorganization it shall "hold public hearings at which an opportunity shall be given any interested party to be heard." This Court has held that a hearing includes the right to present evidence; that it is essential to due process of law; that even where there have been hearings the introduction of new proposals or issues make necessary a further hearing thereon.* In this case the Joint Report of the Compromise Committee and others was filed with the Commission after the record was closed as to all other parties.** It contained proposals for the modification or abrogation of the obligations of the debtor railroads under the Act of 1896, some of which at least, had never before been suggested, on which no hearing had been held. The Com-

*In re Wood and Henderson, 210 U. S. 246, 254, approving the rule as stated by Judge Sanborn; *In re Rosser*, 101 Fed. (CCA 8) 562, 567; *Ohio, Bell Telephone Company* v. *Commission*, 301 U. S. 292, 304; *Morgan* v. *U. S.*, 304 U. S. 1, 18, 22.

**Rec. p. 9761.

mission denied leave to petitioners to introduce evidence and to be heard as to these proposals which vitally affected their rights and interests. It then adopted the proposals in full as a part of its Fourth Plan. Later, over objections of petitioners, it again adopted and certified its Fifth Plan including the same proposals without notice or hearing to anyone. These proceedings of the Commission were approved by the District Court and affirmed by the Circuit Court of Appeals. The Court thus decided an important question of Federal law in a manner probably in conflict with the applicable decision of this Court, and so far sanctioned departures from the accepted and usual course of judicial proceedings as to call for an exercise by this court of its power of supervision.

(b) Section 77(d) of the Bankruptcy Act provides that after a plan is approved the Commission shall "certify the plan to the Court" together with a "transcript of the proceedings." Jurisdiction of the proceeding then passes to the Court. The Circuit Court of Appeals for the Ninth Circuit has held that proceedings on reorganization plans cannot be pending in two tribunals at the same time.* In this case the Commission, without notice or hearing, and over objections of petitioners, reported a new plan of reorganization "revoking and superseding" all former orders while the Fourth Plan was still pending before the Court. In approving this procedure the court below rendered a decision which is apparently in conflict with the requirements of the statute and of the Fifth Amendment; in conflict with the decision of the Circuit Court of Appeals of the Ninth Circuit in a similar matter; and has sanctioned such a departure from the accepted and usual course of judicial pro-

*_Rogers_ v. _Consolidated Rock Products Co._, 114 Fed. (2d) (CCA 9) 108, 110. While this was a proceeding under Section 77 B, the principle involved seems to be the same.

ceedings as to call for the exercise by this Court of its power of supervision.

(c) Section 77(e) of the Bankruptcy Act requires that if the Court finds that plan of reorganization is not in conformity with the requirements of said section it shall enter an order in which it may "either dismiss the proceedings" or return the same to the Commission for further proceedings "under the provisions of sub-section (d) hereof." In this case the District Court found that the Fourth Plan was illegal in essential particulars and could not be approved as certified. It overruled a motion to enter an order disapproving the plan and returning the proceedings to the Commission,* and held that it could modify the plan and approve the same as modified. This Court has held that the District Court has no power to modify or "improve" a plan.** Without entering any order on the Fourth Plan the District Court invited the Commission "on its own motion" to submit a further plan. The Commission then without any hearing submitted its Fifth Plan and by its order thereon "revoked and superseded" all previous orders. Petitioners objected to the Fifth Plan being received and acted upon by the Court.† These objections were overruled. Petitioners then filed objections and claims for equitable treatment as to the Fifth Plan and asked leave to present evidence before the Court and to be heard in support of their objections and claims.†† The Court denied this leave and refused to receive any evidence on the Fifth Plan, which plan was then approved. In approving this procedure the Circuit Court of Appeals rendered a decision which is apparently in di-

*Rec. p. 10823.

**_Ecker_ v. _Western Pacific R. Corp._, 318 U. S. 448, 474.

†Rec. p. 10983.

††Rec. pp. 10962, 11007.

rect conflict with the requirements of Section 77 of the Bankruptcy Act and of the decisions of this Court in the *Ecker* Case *supra;* and sanctioned such a departure from the accepted course of proceedings under said statute and the requirements of due process of law as to call for the exercise by this Court of its power of supervision.

(d) Section 77(e) provides that where a plan is disapproved the proceedings shall be dismissed or referred back to the Commission for reconsideration "under the provisions of sub-section (d) hereof." By its order of January 30, 1945* the Circuit Court of Appeals reversed in essential particulars the order of the District Court approving the Fifth Plan and remanded the proceedings to the District Court with power to remand to the Commission *"all or any part of the plan if in his opinion it is desirable to have the Commission consider further any provisions of the plan in addition to those affecting Old Colony."* (Italics provided.)

By this decision the Court in effect undertook to vest in the District Court power and discretion, not given by the statute, to limit the proceedings before the Commission to those questions which *in the opinion of the District Court,* the Commission should consider, and to deny to the parties including petitioners a hearing as to the provisions of any new plan which might affect their interests, in violation of the statute and of the requirements of due process of law. This decision and order presents an important question of Federal law not heretofore decided, and is such a departure from the requirements of the statute and from the accepted and usual course of proceedings thereunder as to call for the exercise of the supervisory power of this Court.

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*Rec. pp. 241, 242.

2. *As to the obligations of the New Haven under the Act of 1896.*—The Act of 1896 named five railroad companies which were given the right to subscribe for the stock of the Terminal Company and were required to use the terminal upon the terms therein prescribed. Following the name of the New Haven in Section 2 of the Act are the descriptive words "being lessee of the Old Colony Railroad Company". The New Haven subscribed in its own right to 1/5 of the stock which it has since held. In addition thereto 1/5 was subscribed by each of its leased or controlled lines, Old Colony, Boston and Providence and New England. It has used the terminal for nearly fifty years as a "system" station.* The Department of Public Utilities in its order of July 17, 1931 fixing the proportions of payments to be made by the several roads on account of the terminal held:

> "Petitioner (New Haven) is one of the original railroads *required to use said union station. In addition* it is successor to the New England Railroad Company and is lessee of the Old Colony Railroad Company and Boston and Providence Railroad." (Italics provided.)

In its opinion on Order 398** the District Court construed the words "being lessee of the Old Colony Railroad Company" in Section 2 of the Act as meaning "as lessee", etc., thus changing words of description† into words of limitation. On this construction of the Act the Court held that the disaffirmance of the Old Colony lease relieved the New Haven from all obligations under the Act of 1896 except as to the lines of the New England which were not then using the terminal. This threw the entire burden of the New

*See opinion of Commissioner Eastman on First Plan, Rec. pp. 7863, 7993, 7998, 8001.

**Rec. pp. 6159, 6161, 6162.

†*Doney* v. *Equitable, etc. Society* (N. Y.) 117 Atl. 618, 619; *James* v. *Supreme Council,* 130 Fed. 1014, 1016.

Haven proportion of 70% of the terminal expense on the short lines and limited revenues of the Old Colony and Boston and Providence.* The burden so created constituted the chief basis on which the Commission sought to modify the provisions of the Act.**

Even if the construction by the District Court of the language of the Act were correct, it would not follow that by the disaffirmance of the Old Colony lease the New Haven could be relieved of the duties and obligations imposed upon it by the Act of 1896. Under the principles clearly stated and discussed in the case of *Murray* v. *Roberts,* 103 Fed. (2d) (CCA 2) 889, 892, 898, it appears that where, in the public interest, an obligation is lawfully imposed by public authority upon the lessee of a public utility, that obligation cannot be avoided by a mere disaffirmance of a lease. The principle there stated seems to be applicable to this case.

The decision of the Circuit Court of Appeals approving the Fifth Plan, based upon the aforesaid construction of the Act of 1896 by the District Court, involves important questions as to the construction of a State statute upon which the decisions of the District Court and the Circuit Court of Appeals appear to be in conflict with the decision of the State Department of Public Utilities, the highest tribunal of the State which has ever construed this provision of the statute; as to the effect of disaffirmance of the lease, it seems to be in conflict with a previous decision of the Circuit Court of Appeals of the Second Circuit. The

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*See opinion Comn. Eastman March 22, 1940, Rec. pp. 7993, 7997; also Second Report of the Commission, Rec. pp. 8037, 8067.

**The question as to the correctness of this construction of the Act by the District Court was raised on appeal from Order 398 but both the Circuit Court of Appeals and this Court decided that case on other grounds and refused to decide or to express any opinion on the question as to the obligations of the New Haven under the Act. See *Webster and Atlas Bank* v. *Palmer,* 111 Fed. (2d) 215; *Palmer* v. *Webster and Atlas Bank,* 312 U. S. 156, 168.

questions so decided are of such public importance as to call for the exercise of its power of supervision by this Court.

3. *As to the modification or abrogation of the provisions of the Massachusetts Act of 1896.*—The Circuit Court of Appeals held* (a) that the mandatory provisions of the Act of 1896 requiring the railroads named therein to use the terminal upon the terms therein stated amounted in effect "to a burdensome lease" and that the approved plan constituted an offer "of a revised arrangement" which the Terminal Company is free to accept or reject; (b) that the Act of 1896 was as to the user railroads an "enabling act" and as such amended their charters; (c) that by the plan the Commission did not amend the Charter of the Terminal Company, but did amend, "as it can do, the Charter of the New Haven"; and (d) that even if the provisions of the Act of 1896 be considered as an exercise of police power of the State they could be "superseded" by the provisions of a duly approved plan of reorganization.

(a) The Third and Fourth plans of the Commission contained no suggestion of an "offer". The provisions of these plans in this respect were absolute.** The District Court "construed" these provisions into an offer.† The Fifth Plan by Section (N)(1)(a) adopted the same proposals as to modification or abrogation of the provisions of the Act of 1896, but accepting the view of the Court, added a provision that the Trustee of the Terminal Company might accept or reject the same and exclude the debtor from the terminal. The obvious purpose was to bring this case within the decision of this Court on the Terre Haute lease in the

*147 F. (2d) 40, 52; Rec. pp. 11525, 11543.
**Rec. pp. 9753, 9850, 9851, 10123, 10210.
†54 Fed. Supp. 622; Rec. p. 10695.

Milwaukee Case* which was cited by the District Court as an "analogy". In that case the Court was dealing with a private lease between two railroads as to which there was clear power to disaffirm. In this case there is no lease. The use of the Terminal by the user railroads and the terms and conditions of such use are prescribed by a mandatory State law binding upon both the Terminal Company and the user railroads.

An offer to have any validity in law must be one which the offeror has legal power to make and the offeree has legal power to accept. The Commission had no power to "disaffirm" a mandatory State statute. Unless and until the Act of 1896 was lawfully amended or repealed to permit of such action, no such offer as is here proposed could be lawfully made by or on behalf of the debtor railroads, nor did the Terminal Company or its Bankruptcy Trustee under the terms of its charter have any power to consider, accept or reject said offer if made. This "offer" was thus illegal and void. The District Court of Massachusetts is administering the property of the Terminal Company under the charter of that company. It has no power to authorize the Bankruptcy Trustees to consider or accept an offer in violation of its Charter or the existing State law; nor has it power to modify the rights of the creditors of the Terminal Company pending a reorganization plan for that company. In these circumstances the offer appears to have no legal significance. The question is whether the Commission by a reorganization plan under Section 77 could amend or repeal the pertinent provisions of the Massachusetts Act of 1896. If the Commission could do this then no offer was necessary. If it could not, the offer was illegal and meaningless.

**Group of Investors* v. *C. M. St. P. & P. R. Co.*, 318 U. S. 523, 546.

(b) The Court held that the Commission did have this power. To reach this conclusion it held that the Act of 1896 as applied to the user railroads was an "enabling act" and as such constituted an amendment to the Charters of the user railroads; that the provisions of the Act of 1896 having thus become a part of their charters, the Commission could by a plan of reorganization under Section 77(b)(5), further amend these charters to modify or abrogate the obligations imposed upon the railroads by the Act.

An "enabling act" is one which enables the beneficiary thereof to do "what it could not do before."* When the Act of 1896 was passed the five user railroads had power to do and were doing a passenger business in Boston. They were not limited to any specific terminal point in that city. In providing for the construction by a separate corporation of "an adequate terminal" and requiring the five railroads named to use that terminal upon the terms therein prescribed for "all of their terminal passenger business in Boston," the State was not requiring or "enabling" these railroads to do anything that they did not already have power to do. The provisions of the act could not have been enforced by the Supreme Judicial Court of Massachusetts by summary process as provided in the act if they only constituted an "enabling act."

The same is true as to the amendment to their Charters. Not every law imposing duties and obligations upon the railroads is an amendment to its Charter.** Since the user railroads had power to do, and were doing, a passenger business in Boston, and to provide terminals for that purpose, no amendment to their respective Charters was needed to enable them to use the Boston Terminal. There was not

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*Bouvier's Law Dictionary, p. 354; 30 CJS p. 237; *Texas* v. *Campbell* (CCA 5) 120 Fed. 2, 191, 193; *Wise* v. *U. S.*, 38 Fed. Supp. 130.

**_Chicago, etc. R.R. Co._ v. _R.R. Commission_, 237 U. S. 220, 234, _Conn._ v. _New Haven, etc. Company_, 43 Conn. 351.

a word or suggestion in the Act of 1896 to indicate an intent to amend the charters of the user railroads. No instance can be found where any of the user railroads have ever included the provisions of this Act in their Charters or in copies thereof filed in legal proceedings. If the Act of 1896 did not constitute an amendment to the Charters of the user railroads then, of course, no amendment to these charters by the Commission, even if it had power to do so, could affect the requirements of that Act.*

(c) Assuming, however, that the Act of 1896 did amend the Charters of the debtors it does not follow that the Commission had power by a plan of reorganization *ex proprio vigore* to further amend those charters. The decision of the Court was based upon the provisions of Section 77(b)(5) that a plan of reorganization "shall *provide* adequate means for the *execution of the plan* which may include the transfer of * * * all or any part of the property of the debtor to another corporation * * * the amendment of the Charter of the debtor," etc. (Italics provided.) The natural and generally accepted interpretation of this provision is that a plan may either provide for the organization of a new corporation, or for obtaining amendments to the Charter of the debtor, if necessary, to conform the same to the capital structure and lawful provisions of the plan. The Committee putting the plan into effect would then either organize a new corporation under State law or obtain from

*The case of *Worcester, et al.* v. *Norwich, etc., R. R. Co., et als.*, 109 Mass. 103 is cited in support of the position taken by the courts below. In that case the statute was attacked by the railroads as an amendment to their charters which the State did not have the Constitutional power to make. The Court, accepting this view as to the statute, held that it was clearly within the reserve power of the State. The question as to whether it was or was not an amendment to the Charters appears not to have been raised or decided. Here the terminal facilities including tracks were provided by a separate corporation created for that purpose and the railroads were only required to use the same which was clearly within their existing charter powers.

the State the necessary amendments to the Charter of the existing corporation in the manner provided by State law. In accordance with this view a number of States have passed special statutes providing for such incorporations or amendments where the stockholders have been eliminated by the plan.*

The function of incorporating a new company or amending existing State charters is legislative—not administrative or judicial. Congress though frequently urged to do so, has consistently refused to incorporate railroads (except on public domain) and it has certainly never undertaken to amend State Charters. It has left these functions entirely to the States. Assuming that it has the power to do so, it can hardly be conceived that it would confer upon the Commission by a phrase of eight words in the midst of a procedural section of an act dealing with "debtor and creditor relations" any such far-reaching power. Any such construction of Section 77(b) (5) as to substantive State legislation would be destructive of the functions of the State, and would raise a serious question as to its Constitutionality.**

(d) The Court of Appeals also held that if the Act of 1896 be considered "an exercise of police power" it could be "superseded" by a "duly approved plan of reorganization."

This Court has held that the police power of a State is "the power to govern men and things within the limits of its dominion"; that it is "inherent in every sovereignty"; that it is one of the "lease limitable of the powers of gov-

*See Ill. Rev. Stats. Chap. 114, Sec. 174.1; Wis. Stats. 1943 Sec. 190.02 (9)(c), 190.01 (3); Laws of Delaware pp. 429, 430; 1 Maryland Annotated Code 1939, Art. 23, § 133.

**_Continental, etc. Bank_ v. _Chicago etc. Railway Co._, 294 U. S. 648; _Ashton_ v. _Cameron County District_, 298 U. S. 513; _U. S._ v. _Bekins_, 304 U. S. 27.

ernment".* That the fact that the duty or obligation imposed by the exercise of police power is "burdensome" does not justify its annulment.** This Court has also held that where a Federal agency seeks to override State laws the grant of power to do so must be so clear and definite as to "compel" that construction.†

Section 77 of the Bankruptcy Act relating only to "debtor and creditor relations" does not appear to contain any such grant of power to the Commission.

The Court below apparently based its decision on this point on (1) the provision of Section 77(f) to the effect that after a plan has been confirmed as being in conformity with the Act it may be carried into effect, "the laws of any State or the decision or order of any State authority to the contrary notwithstanding;" and (2) upon the regulatory powers of the Commission under the Interstate Commerce Act.††

**Slaughterhouse Cases,* 16 Wallace 36, 62; *District of Columbia* v. *Brooke,* 214 U. S. 138, 149; *Erie R. R. Co.* v. *Commissioners,* 254 U. S. 394, 410; *California* v. *Thompson,* 313 U. S. 109, 113.

***Erie R. R. Co.* v. *Commissioners,* 254 U. S. 394, 410; *California* v. *Thompson,* 313 U. S. 109, 113; *Lyford* v. *N. Y.,* 140 Fed. (2d) (CCA 2) 840; *Atchison, etc. Railway Company* v. *R. R. Commission,* 283 U. S. 380, 394, 395.

†*Atchison, etc. Railway Company* v. *Commission,* 283 U. S. 380, 391; *Palmer* v. *Mass.,* 308 U. S. 79, 83, 84; *Allen-Bradley Local* v. *Board,* 315 U. S. 740, 749; *Wisconsin, etc.* v. *C. B. & Q. Railroad,* 257 U. S. 563, 580.

††See opinion of District Court, 54 Fed. Supp. 623; Rec. p. 10695 Opinion of Circuit Court of Appeals, 147 Fed. 2d 40, 52; Rec. pp. 11525, 11543. The Circuit Court of Appeals cites in support of this view the case of *Texas* v. *U. S.,* 292 U. S. 522, 531 which involved the regulatory power of the Commission under the Interstate Commerce Act. It also cites *In re Missouri-Pac. R. R. Co.,* 39 Fed. Supp. 436, 448. The opinion of the District Court in that case was rested upon the *Taylor* case and was never appealed since the plan involved was abandoned. It also cites the case of *Missouri-Pac. R. R. Co.* v. *Thompson,* 134 Fed. (2d) 139 as affirming the previous case. This latter decision not only did not affirm the previous

The powers of the Commission in the formulation of a plan are granted in Section 77(b). The provisions of Section 77(f) do not become operative until *after the plan is confirmed* and relate only to carrying out the plan so confirmed as to which the Commission has no function. The District Court admitted that the language quoted from 77(f) were not "words of grant".* That being true they could not confer any power upon the Commission. The provision of 77(f) would seem to have been intended to relieve the execution of a lawful and confirmed plan from administrative State laws and regulations as to the issue of securities of other similar matters *involved in the execution thereof*. In practice it has been so understood.

The court below cited the case of *Palmer* v. *Massachusetts,* 308 U. S. 79 as authority for its decision on this point.** The question as to the power of the *Commission* to abrogate State laws under Section 77(f) or any other provision of that statute was not presented in that case. It involved only the question of the power of the District Court to disregard local administrative laws in closing certain local stations.

This Court held that the District Court had no such power and further stated that it had been withheld from the Commission "except as part of a complete plan of reorganization for an insolvent road."** A "complete plan of reorganization" is a plan which has been finally held to be within the powers of the Commission and in conformity with the law and confirmed by the Court. Then only do the

*54 Fed. Supp. 623, 625.

**308 U. S. 79, 88. If the construction given this case by the Circuit Court of Appeals has any justification a clarification of the decision by this Court seems highly desirable.

case but related to an entirely different matter. It was apparently cited in error.

provisions of 77(f) become operative which permit the carrying out of such a plan without regard to local administrative requirements *affecting the execution of the plan,* such as approval of security issues and similar matters.

If it were held that this procedural clause which has no relation to the Commission or its functions, conferred upon the Commission power by a plan of reorganization to set aside any State laws which it deemed burdensome, then it could under that clause modify or annul all of State legislation imposing numerous and burdensome duties and obligations upon the railroads for the safety and convenience of the public. Since the taxing power is of no higher dignity than the police power it could also place a ceiling upon the taxes to be imposed upon reorganized railroads by the several States on the ground that the taxes were burdensome. The law so construed would be destructive of our Federal system and would apparently be unconstitutional.*

Both courts below apparently relied also upon the regulatory powers of the Commission under the Interstate Commerce Act.** Powers of the Commission under the Interstate Commerce Act and under the Bankruptcy Act are conferred under different clauses of the Constitution which relate to entirely different subjects. The only reference in Section 77 of the Bankruptcy Act to the powers of the Commission under the Interstate Commerce Act is in sub-section (q) which relates to the issuance of subpoenas. This express reference to one power would seem to exclude others.

The Commission is a statutory body. It may exercise only those powers conferred by the statute under which it

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**Ashton* v. *Cameron County District,* 298 U. S. 513; *U. S.* v. *Bekins,* 304 U. S. 27.

**Opinions of District Court, 54 Fed. Supp. 595, 623, 631, 639. Opinion of Circuit Court, 147 F. (2d) 40, 52; Rec. pp. 11525, 11544.

is acting. This is not a proceeding under the Interstate Commerce Act. In any event that act grants no power to the Commission either in this or any other proceeding to provide for the construction or use of joint terminals or to prescribe the terms thereof except in the one instance covered by Section 3(5) of the Interstate Commerce Act which obviously has no relation to this case.* With that exception the power to require the construction of terminals and fix the terms of their use, has been intentionally left by Congress exclusively to the police power of the States.**

The Commission disclaimed any power under the Interstate Commerce Act to modify the provisions of the Act of 1896 as to the debtor railroads, and rested its claim of such power exclusively upon the provisions of Section 77 of the Bankruptcy Act.† Under the rule stated by this Court in *Securities and Exchange Commission* v. *Chenery*, 318 U. S. 80, 87, the validity of the order of the Commission approving the plan must be judged upon the grounds upon which it is based. The action of the court below in invoking the power of the Commission under the Interstate Commerce Act which was expressly disclaimed by the Commission, seems to be not only without justification but in conflict with the decision of this Court in the *Chenery* case.

This summary of the issues presented by decision of the Circuit Court of Appeals sustaining, upon the several grounds above stated, the power of the Commission by a plan of reorganization in these proceedings to modify or

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*49 U.S.C. § 3(5).

**See Statement of Chairman Esch in discussion of the Transportation Act of 1920, H. R. Cong. Rec. Vol. 58, p. 8578, et seq.; *Missouri, etc. R. R. Co.* v. *Terminal Rwy. Co.*, 104 I. C. C. 203; *Los Angeles Pass. Ter. Cases*, 100 I. C. C. 421, 142 I. C. C. 849; *R. R. Comm.* v. *Southern Pac. Co.*, 264 U. S. 331; *Interstate Commerce Comm.* v. *U. S. etc.*, 280 U. S. 52, 61, 62; *Atchison etc. Rwy. Co.* v. *R. R. Comm.*, 283 U. S. 380, 390, 391.

†See Report on Third Plan, Rec. pp. 9753, 9785, 9786.

abrogate the provisions of the Massachusetts Act of 1896 as to the debtor railroads, indicates the important and far reaching character of that decision as affecting both the public interests and those of parties immediately concerned. The decision strikes at the very root of the power of a State "to govern men and things within the limits of its domain"; to exercise control over its domestic affairs in the interest of its people, and thus disturbs the "balance between national and State authority in one of the most sensitive areas of government"; it presents important questions as to the construction and application of a State statute; important questions of Federal law which have not heretofore been decided and which should be settled by this Court. It decides questions of Federal and Constitutional law in a way probably in conflict with applicable decisions of this Court. It manifestly calls for an exercise by this Court of its power of supervision and review.

4. *As to revenues from rentals and concessions.*—The Act of 1896(§10) required the user railroads to pay for use of the terminal "such amounts as may be necessary" to pay the expenses and charges there enumerated which included all expenses and charges of the Terminal.* No express provision was made in the Act for future capital improvements. No mention was made of any revenues which might be derived by the Terminal Company from rentals and concessions in the terminal building or from other sources. These revenues were, of course, property of the Terminal Company. They might be used to provide such capital improvements and thus to increase the security for the bonds or for other proper purposes. Since the institution of the bankruptcy proceedings of the Terminal Company now pending, these revenues are property of the Bankruptcy

*See Act of 1896, § 10, Rec. p. 167.

Trustee and creditors of the Terminal Company. They are under the exclusive jurisdiction of the Massachusetts District Court.* The plan approved by the decision of the Court below provides in effect that these revenues of the Terminal Company (or its Bankruptcy Trustee) should be given to the user railroads as a credit against the expenses which they were required to pay under Section 10 of the Act. The Commission in its Report on the Fourth Plan undertook to justify this action by the statement that it is "quite customary to deduct revenues received from rentals and concessions in computing *net operating costs* of terminal operations."** (Italics provided.) The Commission failed to say, however, that in every instance where this has been done the terminal was financed and constructed by the railroads themselves directly or through a holding company and was used and operated under *private contract, not* under the provisions of a mandatory statute which definitely fixed the rights and obligations of the parties. The statute said nothing about "net operating costs". Petitioners asked leave to introduce evidence to show these facts as well as the amount of such revenues and other relevant facts.† This leave was denied by both the Commission and District Court. The action was affirmed by the court below. This provision of the plan was not only arbitrary and unsupported by evidence, but constituted a direct gift of the property of the Bankruptcy Trustee and creditors of the Terminal Company to the user railroads without due process of law, and without compensation, in violation of the Fifth Amendment to the Constitution of the United States. The decision of the court below on this point decides

*_Isaacs_ v. _Hobbs, etc., Co._, 282 U. S. 734; _Ex parte Baldwin_, 291 U. S. 610.

**Report on Fourth Plan, Rec. pp. 10123, 10162.

†See Offer of Proof, Rec. pp. 144-159; Rec. pp. 11007-11010.

important questions of Federal and Constitutional law which should be settled by this Court, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Court.

5. *As to the compromise arrangement embodied in the Joint Report.*—The proposals as to the terminal in the approved plan were made in the Joint Report of the Compromise Committee as part of the compromise plan for the acquisition of Old Colony by New Haven. The Commission and the Court refused to allow petitioners to present evidence as to these proposals and to be heard thereon.* The proposals were adopted by the Commission as submitted by the Committee, including the provisions as to Boston Terminal which were intended to increase the value of Old Colony to New Haven. The Circuit Court of Appeals held that the compromise plan was invalid as to bondholders of Old Colony under the decision of this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106; but held that it was valid as to the terminal interests, although the provisions as to the terminal and Old Colony were all interwoven and inseparable parts of the same compromise arrangement. The Court thus decided an important question of Federal law in a way which was probably in conflict with applicable decisions of this Court, and in such manner as to call for the exercise of the power of supervision of this Court.

6. *The approved plan is not fair and equitable or in accordance with the law of the land.*—So far as is known, this is the only case of a reorganization under Section 77 of the Bankruptcy Act in which it has been sought to modify ex-

*Rec. pp. 10160; 54 Fed. Supp. 595, 627.

penses incident to a terminal facility. Such expenses are always burdensome but they are essential to enable the railroads to perform their functions "for the accommodation of the public".

The conclusion that the terminal was burdensome was not reached upon any study or evidence as to what would be the cost of acquiring or using another terminal facility in Boston. There was no evidence as to the comparative cost of this terminal and others of a similar character throughout the country, including the terminal facilities of New Haven at New York. Petitioners offered to present evidence on all of these questions but leave to do so either before the Commission or the Court was denied.* The conclusion of the Commission was based upon a showing of deficits on the part of the Old Colony due in large part to charging the entire New Haven proportion of the cost of the terminal to the short lines of Old Colony and Boston and Providence.** No part of these charges was assigned to New Haven notwithstanding "that a very important part of the use of that station is in connection with through trains between New York and Boston."† No study was made or evidence adduced as to the earnings and expenses of the passenger traffic in the New York terminal used by New Haven although the report of the Commission indicated that the expenses in that terminal were much higher than at Boston and upon proper study would probably show serious deficits on the western end of the system.†† No suggestion was made of a modification of the cost of New York Terminal operated under contract. Petitioners offered to present evidence as to all of these matters. Leave to do so was denied both by the Commission and the Court. The treatment ac-

*See Offer of Proof, Rec. pp. 144-159; Rec. pp. 11007-11010.

**See Commission's Report of Feb. 18, 1941, Rec. pp. 8037, 8057.

†See Commission's Report of Feb. 18, 1941, Rec. pp. 8037, 8057.

††Rec. pp. 8037, 8066, 8067.

corded Boston Terminal interests by the plan approved by the Court appears, therefore, to have been arbitrary, discriminatory and unsupported by adequate evidence and not in accordance with legal standards.*

Even if the so-called offer contained in §§N(1)(a) and N(1)(b) of the plan be ignored or rejected by the Bankruptcy Trustee of the Terminal Company (as it clearly must be for reasons already stated), the plan if approved becomes effective as to the debtor railroads. Petitioners and other bondholders of the Terminal Company whose security was so carefully safeguarded by the Act of 1896, will have been deprived of their security and property; including the revenues of the terminal from rentals and concessions,** in order to enrich the Old Colony and to make it a more attractive purchase for New Haven. Petitioners will have been denied their right to produce evidence and be heard as to these provisions of the approved plan. As to petitioners the plan is unfair and inequitable and if made effective deprives petitioners of their property without due process of law and without compensation in violation of their legal and Constitutional rights. The decision of the Circuit Court of Appeals affirming the order approving said plan as to petitioners should be reviewed by this Court to the end that the law may be properly administered in accordance with the decisions of this Court, and that the errors herein outlined may be corrected.

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*_Ecker_ v. _Western Pac. R. Corp._, 318 U. S. 448, 473.

**For amount of these revenues by years see Offer of Proof, Rec. pp. 155, 156.

WHEREFORE, petitioners respectfully pray that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the Second Circuit, demanding that Court to certify and send to this Court a full and complete transcript of the record in all proceedings in this cause; that the cause may be reviewed by this Court that the order of said Court entered on January 30, 1945 may be reversed.

Dated May 22, 1945.

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Nos. 1315-1316

Supreme Court, U. S.
FILED
JUN 14 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1944

IN THE MATTER

of

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor.

HOMER N. CHAPIN, *ET AL.*, as EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS,

Petitioners, No. 1315

THE COMMONWEALTH OF MASSACHUSETTS, THE CITY OF BOSTON, WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee, THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,

Petitioners, No. 1316

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Dated: June 12, 1945.

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Supreme Court of the United States

OCTOBER TERM, 1944.

IN THE MATTER

of

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
Debtor.

HOMER N. CHAPIN, *et al.*, AS EXECUTIVE COMMITTEE FOR INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS,
Petitioners, No. 1315

THE COMMONWEALTH OF MASSACHUSETTS, THE CITY OF BOSTON, WEBSTER AND ATLAS NATIONAL BANK OF BOSTON, Trustee, THE MUTUAL SAVINGS BANK GROUP COMMITTEE FOR BOSTON TERMINAL COMPANY BONDS,
Petitioners, No. 1316

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, Debtor, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents, Insurance Group, Mutual Savings Bank Group, Bankers Trust Company, Trustee of the First and Refunding Mortgage, United States Trust Company,

Trustee of the Harlem River & Port Chester Mortgage, Irving Trust Company, Trustee under Indenture dated April 1, 1925, City Bank Farmers Trust Company, Trustee of the First Mortgage of the Central New England Railway Company, Reconstruction Finance Corporation and the Protective Committee for holders of Boston and New York Air Line First Mortgage 4% Bonds own or represent substantially all of the secured debt of the New York, New Haven and Hartford Railroad Company, Debtor. The respondent Old Colony Railroad Company represents the largest single unsecured claim against that estate. These parties have actively cooperated in urging expeditious final approval and adoption of the plan of reorganization which has the approval both of the Interstate Commerce Commission (hereinafter called the "Commission") and of the District Court for the District of Connecticut. The order of said District Court approving the plan was affirmed substantially in its entirety by the opinion of the Circuit Court of Appeals rendered January 2, 1945, as modified by an opinion rendered January 25, 1945. The respondent, New York, New Haven and Hartford Railroad Company, Debtor, represents the equity interest in the bankruptcy estate and has approved and sponsored those aspects of the plan involved in the present petitions.

Opinions Below.

Opinions of District Court—December 21, 1943 on Fourth Plan, 54 Fed. Supp. 595; March 6, 1944 approving Fifth Plan, 54 Fed. Supp. 631. Opinions of Circuit Court of Appeals—January 2, 1945, 147 F. (2d) 40,[1] and January 23, 1945, 147 F. (2d) 53.[2]

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[1] Rec. p. 11525.
[2] Rec. p. 11563.

Jurisdiction.

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. §47(c)).

The Property Involved.

The New York, New Haven and Hartford Railroad system includes the properties of the New Haven proper, those of the Old Colony Railroad Company, the lease of which was rejected by the New Haven Trustees, and those of the Boston & Providence Railroad Company, the lease of which was rejected by the Old Colony Trustees. The Old Colony and the Boston & Providence are commonly referred to as the East End properties. The New Haven Trustees continue to operate the East End properties under appropriate orders of the District Court. Under the plan of reorganization the properties of the New Haven proper are capitalized at $365,000,000, and provision is made for the acquisition of the properties of the Old Colony and of the Boston & Providence by the issuance of additional securities not in excess of $7,600,000 for the former and of approximately $6,000,000 for the latter. The passenger lines of the Old Colony and the Boston & Providence terminate in Boston at the South Station, owned by the Boston Terminal Company.

The pending petitions involve no provisions of the plan relating to the capitalization, or its distribution among the numerous claimants or the acquisition of the East End properties. They are limited to the provisions of

the plan relating to the terms upon which the reorganized company may use the facilities of the Boston Terminal Company and to the limitations on the obligation of the reorganized company to furnish passenger service at a loss over the lines of the Old Colony.

Statement of the Case.

The proceedings for the reorganization of the New Haven were instituted over nine and one-half years ago by order of the District Court for the District of Connecticut, entered October 23, 1935. After a period of preliminary study and preparation the first proposed plan of reorganization was filed on June 1, 1937. Since that time the Commission has held hearings on the plan of reorganization on six different occasions at which more than 4,300 pages of testimony were taken and some 300 exhibits, comprising many hundreds of pages, were introduced in evidence. During this period the Commission has entered six reports and orders supplemental to its original report and order and, in addition to affording an opportunity for oral arguments at the hearings before it, has permitted the parties to file briefs on ten different occasions. The District Court has held hearings on the plan on three occasions and has written three opinions with respect thereto. The printed record in the District Court alone, exclusive of the transcript of the hearings on the plan of reorganization, is now in excess of 11,000 pages. Various aspects of this reorganization have been reviewed by the Circuit Court of

Appeals on eleven[1] different occasions and by this Court on six[2] different occasions.

The major part of this litigation has dealt with the questions relating to the East End properties, including the power of the District Court to authorize the New Haven Trustees to discontinue payments on account of the Boston Terminal interest charges and taxes. The District Court's order authorizing such discontinuance was appealed to this Court and the authority so exercised was expressly confirmed.[3] We believe it fair to say that the record made below, both in the Commission and before the courts, in connection with the problems so raised, represents probably the most thorough study of operating conditions and problems ever made in any reorganization under Section 77 of the Bankruptcy Act.

An important aspect of any successful reorganization of the New Haven, if that is to be accomplished without a dismemberment of the system, is the need for reducing and controlling the enormous losses occasioned by local passenger service on the East End properties. Since the

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[1] *In re N. Y., N. H. & H. R. Co., Claim of Conn. Ry. & Lighting Co.*, 95 F. (2d) 483 (1938); *Old Colony R. Co.* v. *N. Y., N. H. & H. R. Co.*, 98 F. (2d) 670 (1938); *Converse et al.* v. *Commonwealth of Mass.*, 101 F. (2d) 48 (1939); *Palmer* v. *Palmer*, 104 F. (2d) 161 (1939); *Merchants National Bank of Boston* v. *N. Y. N. H. & H. R. Co.*, 102 F. (2d) 923 (1939); *Conn. Ry. & Lighting Co.* v. *Palmer*, 109 F. (2d) 568 (1940); *Palmer et al.* v. *Warren et al.*, 108 F. (2d) 164 (1940); *Webster & Atlas National Bank of Boston* v. *Palmer*, 111 F. (2d) 215 (1940); *Bankers Trust Co.* v. *Palmer*, 109 F. (2d) 136 (1940); *New York Trust Company* v. *Palmer*, 101 F. (2d) 1 (1939); *In the Matter of New York, New Haven & Hartford Railroad Company, Debtor*, 147 F. (2d) 40, 53 (1945).

[2] *Connecticut Railway & Lighting Co.* v. *Palmer*, 305 U. S. 493 (1939); *Palmer* v. *Palmer*, 305 U. S. 578 (1939); *Palmer* v. *Massachusetts*, 308 U. S. 79 (1939); *Warren* v. *Palmer*, 310 U. S. 132 (1940); *Palmer* v. *Webster & Atlas National Bank*, 312 U. S. 156 (1941); rehearing denied 312 U. S. 714 (1941); *Palmer* v. *Connecticut Railway & Lighting Co.*, 311 U. S. 544 (1941).

[3] *Palmer* v. *Webster & Atlas Bank*, 312 U. S. 156 (1941).

disaffirmance of the leases of the East End properties, the operation of those properties for the accounts of the lessors by the New Haven Trustees has resulted in a substantial lien claim for operating deficits in favor of such Trustees. This Court, at the time it was considering the appeals from Order No. 145, recognized the excessive amount of these losses.[4] Efforts to minimize these losses by adoption of practical economy measures, by seeking permissive local authorization for reduction of passenger service and by action of the District Court were unavailing, although in passing upon the last mentioned attempt this Court pointed the way to effective control through a plan of reorganization.[5]

The Commission's First Report,[6] dated March 22, 1940, upon the plan of reorganization contained permissive provisions for the acquisition of the Boston & Providence properties but made no provision for the acquisition of the Old Colony properties where the most severe passenger losses were incurred. Upon rehearing, however, the Commission, by a Supplemental Report,[7] dated February 18, 1941, expanded the provisions of the plan to require acquisition by

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[4] In affirming the District Court's order authorizing discontinuance of payments on account of Boston Terminal bond interest and taxes Mr. Justice Roberts pointed out (*Palmer* v. *Webster & Atlas National Bank,* 312 U. S. 156, 161):

> "The trustees' operation of Old Colony and Boston and Providence properties has resulted in losses exceeding $20,000,000 in the period between October 23, 1935, and December 31, 1939. This excess of expenditures over receipts is secured by liens on the properties. Payment of the taxes and bond interest of Boston Terminal Company has required cash advances increasing the accumulating deficit at the rate of approximately $800,000 per annum. The trustees believe that the properties of the lessors are insufficient to secure repayment of further cash advances by the New Haven estate and that to make them will jeopardize the claims of New Haven's own secured creditors."

[5] *Palmer* v. *Massachusetts,* 308 U. S. 79, 88 (1939).

[6] R. p. 7863.

[7] R. p. 8037.

the reorganized company of both the Boston & Providence and the Old Colony. This requirement was coupled with a provision evidently intended to afford protection against passenger losses, which losses were shown by exhaustive studies to be attributable in a large part to excessive and disproportionate expenses in connection with the operation of the Boston Terminal[8] and which had been a primary contributing factor to the system's insolvency.

When this plan reached the District Court for hearing, that Court held that the reorganized company could not be compelled to assume the Old Colony's obligation to afford passenger service without reasonable protection against excessive losses incident thereto, concluded that the provisions designed for that purpose were not adequate, and appointed a committee known as the Compromise Committee to make studies and recommendations with respect to this problem.[9] The Compromise Committee recommended that the reorganized company furnish passenger service over the Old Colony lines but with certain protections against excessive losses, including a reduction of the charges incident to the use of the Boston Terminal facilities.

The report of the Compromise Committee was commented upon favorably by the District Judge and was commended by him to the Commission for its favorable consideration. After rehearing in February 1942, when thorough consideration was given to the East End problems, the Committee and certain of the parties filed the so-called Joint Report, the principal feature of which was their recommendation of a purchase price for the Old Colony. Thereafter the Commission issued its Third Supplemental Report and Order, which altered the provisions of the plan

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[8] R. p. 8057.
[9] R. p. 8958.

with respect to the acquisition of the East End properties by the reorganized company, adopting in most respects the provisions affording protection against excessive passenger service losses recommended in the two Reports.

As a condition to such acquisition the plan provides that the reorganized company's obligation to afford passenger service on the Old Colony's lines may be discontinued if the losses resulting therefrom shall exceed the "critical figure" established by the plan. The critical figure for the initial period comprising the two years following the consummation date, or January 1, 1946, whichever shall be the later, requires the reorganized company to absorb Old Colony passenger losses up to $850,000 for any twelve consecutive calendar months falling within said period before discontinuing passenger service. Subsequent to the initial period the critical figure of passenger losses is $500,000 for any twenty-four consecutive calendar months and passenger service must be continued unless the losses incident thereto exceed that figure. In the event passenger service is discontinued, the Commonwealth of Massachusetts is given an option to purchase the passenger facilities, at the salvage value thereof, on the line which serves principally commuters from Boston to Braintree.

The terms and conditions for acquisition of the Old Colony also include amendment of that company's and the Debtor's charter, franchise and statutory obligations, so that the reorganized company's obligation to make payments on account of annual interest charges on the Boston Terminal debt will be determined "by applying to $275,000 the percentage of the total use of such property from time to time by" the New Haven including its use as operator of the Old Colony.[10] This condition is coupled with a pro-

[10] R. pp. 10908-9, Fifth Supplemental Report, Feb. 8. 1944.

viso permitting the Commission to make an equitable revision of the amount payable for use of the Boston Terminal properties if the number of passengers using the Terminal shall substantially increase in the future. On the other hand the reorganized company is given the right to cease using the Boston Terminal. The plan expressly recognizes the right of the Boston Terminal bankruptcy trustee to elect either to accept these terms or to reject the same and exclude the reorganized company from occupation and use of the terminal facilities. In the event of the latter election, such trustee may file a proof of claim in these proceedings for damages for breach of contract.

After issuance of the Commission's Third Supplemental Report and Order, dated October 6, 1942, certain petitions for rehearing were filed, and, in November, 1942, for the first time, the Boston Terminal interests appeared in the proceedings before the Commission[13a] and sought leave to produce evidence.

On October 14 and 15, 1942, the various major problems of construction of Section 77 had been argued before this Court in the *Western Pacific*[11] and the *Milwaukee*[12] cases and it was expected that this Court's opinions would chart the course by which reorganizations under Section 77 might be carried forward to expeditious completion in accordance with the declared policy of the statute[13]. On March 15, 1943

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[11] *Ecker* v. *Western Pacific R. R.*, 318 U. S. 448 (1943).

[12] *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. R.*, 318 U. S. 523 (1943).

[13] *Continental Bank* v. *Chicago, Rock Island & Pacific Railway*, 294 U. S. 648 (1935).

[13a] The Trustee for the Terminal Bonds appeared specially in 1939 in the litigation culminating in *Palmer* v. *Webster & Atlas Bank*, 314 U. S. 156 (1941).

this Court handed down its opinions in those cases, which contained a comprehensive interpretation of Section 77 and outlined the respective functions of the Commission and the District Court. Largely as a result of these two opinions much progress has been made in completing other reorganization cases.

Pending this action by this Court, the Commission had held reports on most reorganization plans in abeyance, and on July 13, 1943, after the filing of such opinions, the Commission entered its Fourth Supplemental Report and Order with respect to the New Haven reorganization. In its Fourth Supplemental Report and Order the Commission denied the petitions of the Boston Terminal parties for a rehearing, although stating that it would have been glad to receive such evidence as might have been the subject of a timely offer.[15] In addition, the Commission made certain minor changes in the plan theretofore approved by it and expanded somewhat its findings to accord with the opinions of this Court in the *Milwaukee* and *Western Pacific* cases.

Hearings on this plan were held by the District Court on October 5, 6 and 7, 1943. On December 21, 1943, the District Court filed an opinion, without entering any order, generally approving the plan but pointing out certain respects where legal standards had not been complied with and indicating corrections that were required. The Commission, without further hearing, entered its Fifth Supplemental Report and Order giving effect to the corrections suggested by the District Court with minor variations.[16] The plan embodied in this Report and Order was approved by the District Court.

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[15] R. p. 10160.

[16] As was said in *Ecker* v. *Western Pacific R. R.*, 318 U. S. 448, 474, the District Court "may veto the plan in its entirety but may improve it only by suggestion".

Appeals were taken to the Circuit Court of Appeals for the Second Circuit from the order of the District Court by the present petitioners and by other interested parties. The Court below affirmed the District Court's order in so far as such order approved the provisions of the plan involved in the instant petitions. The Court below disapproved the provisions relating to certain banks and the price to be paid for Old Colony. The District Court, accordingly remanded the plan to the Interstate Commerce Commission for further consideration of certain provisions relating to the acquisition of the Old Colony including, as a result of a supplemental opinion by the Circuit Court, the matters dealing with Old Colony passenger service. The claims of the banks are being dealt with as an administrative matter.

Petitions for further public hearings were filed with the Commission by the Committee for Old Colony bonds and by the Pennsylvania Railroad as a principal New Haven stockholder. The former sought to supplement the record on Old Colony matters; the latter sought a rehearing on every aspect of the proceeding.

After reviewing the record, including the most recent financial statements of the operation of the New Haven and Old Colony, the Commission made public its Sixth Supplemental Report,[17] dated May 14, 1945. In this Report the Commission denied all petitions for further public hearings, reaffirmed its previous determination as to the purchase price payable for the Old Colony property and again approved the provisions of the plan prescribing conditions for the continuance of passenger service on the Old Colony, with discontinuance thereof if stated conditions are not met. From the Commission's Sixth Supple-

[17] Finance Docket No. 10992, decided May 14, 1945.

mental Report it is plain that the Commission has again reviewed the record and concluded that the losses in the operation of passenger service on Old Colony lines warrant a continuation of that service only on the conditions prescribed by the Commission.

The only remaining aspects of this reorganization proceeding which the Court below believed required further consideration by the Commission have again been fully reviewed by it as recently as May 1945. The plan of reorganization is now before the District Court for confirmation.

The Questions Presented by the Petitions.

Both of the petitions set forth numerically long lists of questions. Upon analysis, however, it becomes plain that these are but elaborately stated variants of a single question of substantive law, namely, whether the Commission and the District Court, in adopting and approving a plan of reorganization for an insolvent interstate railroad system, are prohibited from specifying modified obligations to be assumed by the reorganized company with respect to the payment for, and use of, passenger terminal facilities and with respect to the furnishing of local service involving substantial losses, merely because the obligations to be modified are prescribed by a state statute.

In addition, petitioners raise certain further questions relating to practice and procedure that are hereinafter discussed.

ARGUMENT.

POINT I.

Section 77 confers upon the Commission power to approve a plan of reorganization modifying statutory obligations relating to the use of and charges for terminal facilities and the local passenger service furnished by an interstate carrier.

A. As to the Terminal Facilities.

In approaching the question raised as to the power of the Commission under Section 77 to modify the obligations of the bankrupt New Haven, Old Colony and Boston & Providence to use and pay for the use of the Boston Terminal facilities two salient facts should be borne in mind: first, the exhaustive studies with respect to operation of the East End properties clearly developed the oppressive nature of the charges for the Boston Terminal;[1] and second, the provision for modification of the terms for use of the terminal facilities is only *an offer*[1a] which may be accepted or rejected.

The power of the Commission to prescribe the terms upon which the reorganized company should use the Boston Terminal is found in Section 77. The District Court specifically found that the Boston Terminal is a creditor of the New Haven and as such is entitled to prove a claim for damages if it does not elect to accept the offer of modified terms. Subsection 1 of Section 77(b) specifies that the plan of reorganization "shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the

[1] R. p. 8057.

[1a] R. pp. 10754, 11545.

issuance of new securities of any character *or otherwise*" (Italics supplied). Thus both the limitation imposed upon the amount which the reorganized company shall pay for the use of the Boston Terminal facilities and the modification of the obligation to use merely modify the rights of a creditor through means other than the issuance of new securities, and, as such, are an exercise of authority plainly conferred by the above-quoted subdivision.

The obligation to pay for the use of the terminal is a "fixed charge" closely akin to fixed interest and fixed rentals, and hence of a character peculiarly within the traditional scope of the bankruptcy power. The holders of the Terminal Bonds who are the beneficiaries of the New Haven's obligation to pay for using the terminal constitute but a limited class of private investors. As such they have not shown any reason why they, as distinguished from other private investors, should be protected by the police power or any other power of the Commonwealth from the misfortunes attendant upon bankruptcy and in frustration of the policy of the federal bankruptcy laws which contemplate fair and equitable treatment of all creditors.

What the Commission and the District Court have sought, and what the plan in essence accomplishes is the reduction of a fixed charge obligation that would otherwise be burdensome to the reorganized company. The statutory authority for this is plain. Subsection 4 of Section 77(b) requires that a plan provide only such fixed charges as shall be adequately covered in the light of probable future earnings. To this end, pursuant to subsection 5 of Section 77(b), the plan may embrace a great variety of provisions, including amendments of the charter of the debtor, may "deal with all or any part of the property of the debtor", may reject executory contracts,

and may "include any other appropriate provisions" not inconsistent with the section.

The obligation to use the Terminal properties constitutes to a large extent the intolerable burden which the plan of reorganization is designed to remove. The right to cease using the Boston Terminal properties is a further protection to the reorganized company against being forced to continue to bear the burden of a facility ill-adapted to its business and expensive to operate.

The Commission's treatment of Terminal obligations is closely analogous to its treatment of the Terre Haute Bonds in the Milwaukee reorganization which this Court sustained as fully within the power of the Commission under the provisions of Section 77, Subsections (b)(1), (b)(4), (b)(5) and (e)[3]. There the bonds of the Terre Haute, like those of the Terminal, were obligations of a corporation outside of the Section 77 reorganization proceedings. The Commission there made an exhaustive study of the lessor's value to the system, just as it did in these proceedings with respect to the Terminal. It concluded in that proceeding that an affirmance of the lease obligations would constitute a discrimination in favor of the holders of the lessor corporation's bonds, at the expense of the creditors of the principal debtor. Similarly, here an affirmance of the Terminal obligations undisturbed would operate as a discrimination in the favor of their holders at the expense of the New Haven creditors. There, as here, the equitable solution of the problem was found in the creation of an option offered to the bondholders who were outside of the proceed-

[3] 318 U. S., pp. 546-555. On June 11, 1945, this Court denied a petition for a rehearing on its refusal to grant a petition for certiorari to review the action of the Seventh Circuit in dismissing appeals from the District Court's order approving the Milwaukee plan of reorganization as modified pursuant to this Court's decision. (*Darragh Park, etc.*, v. *Group of Institutional Investors*, No. 907, June 11, 1945.)

ings, whereby they might continue a relationship with the reorganized debtor upon reduced terms, found by the Commission and the District Court to be fair and equitable. But in both cases, the offerees were left free of compulsion by the bankruptcy court to accept or reject the terms offered, as their interests might dictate.

Under these parallel conditions this Court's decision in the *Milwaukee* case, *supra,* is clearly conclusive against the contentions of the petitioners here. The opinion of the Court, throughout its entire discussion of the Terre Haute Bonds, is implicit in its rejection of contentions similar to those urged by petitioners here, and explicit in its construction of the law as giving the Commission power to keep the fixed charges of the debtor within proper limits, and to prevent discrimination in favor of bondholders outside the proceedings. As Mr. Justice Douglas carefully pointed out (p. 550):

> "These provisions [§ 77(b) (1) (4) and (5) and (e)] taken together mean to us that the Commission (and the District Court) have the authority in approving a plan to condition acceptance of a lease on terms which are necessary or appropriate to keep the fixed charges within proper limits or to do equity between claims which arise under the lease and the other claims against the debtor. Like the question whether a lease is burdensome . . . one phase of that problem is whether the lease is worth its annual charge. A disregard in that determination of the sacrifices which other creditors are making would be wholly incompatible with the standards which § 77 has prescribed for reorganization plans."

One of the petitioners, Institutional Group for Boston Terminal Bonds, seeks to avoid the controlling force of the Milwaukee ruling by emphasizing that the Terre Haute was

under lease to the debtor. This difference, as we point out elsewhere herein, is of no controlling legal significance in the administration of the bankruptcy laws. Moreover, it completely ignores this Court's construction of Section 77 as empowering the Commission "to keep the fixed charges within proper limits" and seeks to nullify the power conferred to "include any other appropriate provisions not inconsistent with this section" in dealing with the excessive charges for the use of the Terminal.

In one respect, indeed, the present case calls even more urgently for relief than did the Terre Haute, for there was no finding there that the lease was burdensome, whereas here the Commission has expressly found that the Terminal charges are excessive. *A fortiori* they require modification more urgently than did the Terre Haute obligations. It is abundantly clear, therefore, that in essence the question urged by petitioners here was decisively settled in the *Milwaukee* case, and *no new question* is involved here calling for discretionary action by this Court granting certiorari.

B. As to the Local Passenger Service on Old Colony.

The opinion of this Court in *Palmer* v. *Massachusetts*[4] pointed the way, through a plan of reorganization, to control the enormous losses incurred in local passenger service on lines of the Old Colony. In that case this Court declined to uphold the District Court's action in authorizing elimination of certain local passenger service that resulted in very substantial deficits. In its opinion this Court said:

> "In view of the judicial history of railroad receiverships and the extent to which §77 made judicial action dependent on approval by the Interstate Commerce Commission, it would violate the traditional respect of Congress for local interests and for the

[4] 308 U. S. 79.

> administrative process to imply power in a single judge to disregard state law over local activities of a carrier the governance of which Congress has withheld even from the Interstate Commerce Commission, *except as part of a complete plan of reorganization for an insolvent road.*
>
> • • • • • •
>
> "It is not without significance that after four years no reorganization plan for the New Haven has yet been evolved. Perhaps it is no less true that amenability to state laws will serve as incentive to the formulation of *reorganization plans which, on approval by the Commission, do supplant state authority.*" (Italics supplied.)

In support of this conclusion the opinion referred to subsection (f) of Section 77, which provides that the reorganized company shall have full power and authority to put into effect and carry out the plan "the laws of any State or the decision or order of any State authority to the contrary notwithstanding".

The incentive referred to in this Court's opinion has, together with other forces, now served to produce a plan of reorganization approved by the Commission, the District Court and the Circuit Court of Appeals, as well as by the vast majority of the secured creditors represented in the proceedings. The approved plan adopts, as a means of controlling the great losses in local passenger service, the very method suggested by this Court in its construction of Section 77 in *Palmer* v. *Massachusetts.* Consequently, it seems clear that the position of the Commonwealth with respect to these so-called "service provisions" presents no new question for determination by this Court.

The plan greatly benefits the public by safeguarding the continuance of reasonable passenger service on the Old Colony lines. Its defeat might result in the cessation of

that passenger service by the reorganized New Haven and neither the Commonwealth nor the City of Boston has a sound basis for attacking it.

C. As to Concession Income.

The Terminal interests argue that the plan is arbitrary in confirming the practice followed for over forty years of off-setting income from concessions against operating expenses. But the Act of 1896 contained a complete financial plan in which concession income had no place other than as an offset to operating expenses. The Act provides for the payment of all expenses of the Terminal Company: taxes, bond interest, operating expenses and even dividends. The bonds contain no provision for a sinking fund nor any provisions requiring capital improvements. Obviously, capital improvements were to be financed, as in fact they were in 1930, by additional bonds. Hence, if the construction of the Act urged by the Terminal interests were adopted, there would have been accumulating in the Treasury of the Terminal Company over the past forty or more years, funds for which no purpose had been assigned. They could not even be paid out as dividends since dividends were limited to 4%. Now, after this long period, the bondholders for the first time claim a construction of the Act which is obviously at variance with its provisions. In any event the practical operation of this financial arrangement is one for determination by the Commission and the District Court. It clearly involves no question requiring review by this Court.

POINT II.

The Boston Terminal Company Act is not an exercise of police power; but even if it were it is subject to federal legislation on the bankruptcy of interstate carriers.

A. The Boston Terminal Act is not an Exercise of Police Power.

The Circuit Court of Appeals expressly held that the Boston Terminal Act was merely enabling legislation to permit the railroads which sponsored it to obtain the facilities of a union station and was not an exercise of police power by the Commonwealth. This holding is abundantly supported by the history of the act which discloses that the legislation was in fact instigated by the then president of the New Haven. It was through his efforts that a union terminal was created, and neither the Commonwealth nor the City of Boston showed any great interest in the scheme until it was forced upon their attention.[1]

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[1] Reference to official documents and public records (Benton, closing argument on Southern Union Station, Boston Public Library, Shelf #7658, 110A) will show that there were hearings before the Legislature in the early part of 1896 and the bill was supported by Mr. J. H. Benton who was counsel for Old Colony and also for the New Haven of which Mr. Charles P. Clark was then president. In the course of his argument before the Joint Railroad Committee of the Massachusetts Legislature on April 13, and 14, 1896, Mr. Benton said:

> "He [Mr. Clark] called to his service men of exceptional experience and ability as engineers, the chief engineer of the New Haven Railroad and the chief engineer of the New England Railroad; and they had the benefit of conference with the city engineer of Boston, an equally experienced and able engineer in his department. Mr. Clark called also to his aid the operating men of these roads * * * (p. 4).
>
> "The engineers and the operating men went to Philadelphia, to Chicago, and to St. Louis. * * * They had all the information that could be gathered upon this subject, and they set about

The New Haven understandably took the lead in the active promotion of the plan for a union terminal and its incorporation, since four of the five railroads entering Boston on the south had been brought by leases and otherwise under the common management of the New Haven. It had three separate terminal passenger stations in Boston and it was important from an economic viewpoint to unite the operations of these stations into one union station. The Boston and Albany, the fifth of the railroads, was rather indifferent although it finally yielded and consented to go into the plan. The next stage was to persuade the City of Boston to join with the railroad companies in petitioning the Massachusetts Legislature for the charter

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to see if a plan could be devised which would be workable and within the limits of reasonable expense * * * but the problem presented was that of providing a union station with such connections between the tracks of the different roads, and between the points where those tracks reached the terminal station grounds, as would provide for an interchange of traffic * * * (p. 5).

"The promoters of this bill, the officials of the railroads and of the city, believed that this extension of Summer Street * * * are adequate * * * (p. 18).

"The railroad companies cannot ask, and they do not ask, that the Legislature should cut off an important part of the City from proper and adequate access to the City proper; * * * (p. 18).

"This plan in its entirety is the best plan, in fact the only plan which the railroads were able to present to the consideration of the mayor as proper to be presented to the legislature for its approval. To this plan thus worked out, Boston & Albany Railroad gave a somewhat reluctant but finally a full and fair assent; and it is the one which all the companies are now prepared immediately to execute if it is approved by the legislature by the passage of the bill presented by the Mayor * * * (p. 22).

"Now, Mr. Chairman and gentlemen, there is not a line or a word in the bill that attempts to give any property to anybody except the provision that the Terminal Company shall acquire and shall convey to the city 172,900 feet of land free of cost for extending Dorchester Avenue." (p. 50).

of the Boston Terminal Company. This was finally accomplished.[2]

These sponsors considered the *statute merely enabling legislation* which was appropriate under the circumstances, and not a means by which obligations were imposed on the railroads against their will.[3]

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[2] It appears from the public and legislative records that at certain stages in the proceeding the Boston City Council disapproved of the plan entirely, although later on its consent was obtained, in the following resolution of the City Council of Boston, in Common Council, April 16, 1896:

> "RESOLVED: that the City Council of Boston, while it believes in the necessity for a Union Station on the South side of the city, protests against the passage of the bill providing for such a station, which is now pending before the Legislature.
>
> And be it further resolved that the City Council protests against the passage of any bill for a South Union Station which involves the expenditure of money by the city of Boston, unless such bill shall also provide that before it shall become operative it shall be accepted either by the citizens at large, or by their representatives in the City Council."

[3] Josiah Quincy, Mayor of Boston, in his opening statement before the Joint Railroad Commission on March 18, 1896, said:

> "As will be readily understood, it has been necessary to have a bill framed by the joint action of the representatives of the City of Boston and the various railroads concerned, to be presented to this Committee as meeting with the approval of all parties concerned in every respect, and, therefore, all the provisions of the bill which relate more directly to the railroads had been submitted to the representatives of the City for their approval, and the portions of the bill which provide for the performance by the City of Boston of the portion of the undertaking which devolves upon it have in a like manner been submitted to the representatives of the railroads. So that we come before you with a bill containing all of the legislation which seems to us necessary, affecting either the railroads or the City, for the carrying out of this undertaking, and in a form which is satisfactory to the representatives of the different railroads concerned and of the City."

See: *Opening Statement of Josiah Quincy before Joint Railroad Commission of Massachusetts Legislature on Bill to Provide for a Southern Union Passenger Station in Boston* (Massachusetts State Library), p. 17.

Charles F. Choate, in his opening statement before the same Commission, added:

> "Now I do not want to take up the time of this Committee in arguing unnecessarily. I think the fact of the matter is a

Police power is the power inherent in a government to enact laws within constitutional limits to promote public safety, health and morals and the general welfare of society. *License Cases.*[4] The Boston Terminal Company Act is not such an act. It is an amendment of the charters of the using railroads rather than an exercise of police power under the holding of the Supreme Judicial Court of Massachusetts in the case of *Mayor, etc. of Worcester* v. *Norwich and Worcester Railroad Company.*[5]

The Commonwealth of Massachusetts, by joining in the petition with the private Boston Terminal interests, is apparently now asserting that the Boston Terminal Act represents an exercise by it of its police power. However, the Commonwealth, which has been an active party in this proceeding both before the Commission and the District Court for many years, heretofore has not only refrained from advancing the argument of police power but has, in fact, sought to avail itself of any benefits flowing from the revision of the using railroads' obligations to the Boston Terminal.

As early as December 1939 the Special Railroad Commission for the investigation of transportation facilities in Massachusetts, created by the Massachusetts Legislature,[6] stated in its exceptions and brief filed with the Interstate Commerce Commission that a great part of the losses from the operation of the Old Colony resulted from charges payable by it for use of the Boston Terminal facilities and

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very plain and simple one. If you want a terminal station, there it is; the railroads and the city are ready to give it."

See: *Transcript, Southern Union Station Legislative Hearings* (Massachusetts State Library), p. 19.

[4] 46 U. S. 504, 631 (1847).

[5] 109 Mass. 103 (1871).

[6] Massachusetts Resolves of 1939, Chap. 64.

that unquestionably the reorganization of the Boston Terminal would result in the adoption of a plan by which these charges will be greatly reduced. Substantially the same position was taken in the exceptions and briefs filed at that time by the Commonwealth of Massachusetts. In testimony before the Interstate Commerce Commission the Chairman of the Special Railroad Commission and a consultant of the Massachusetts Department of Public Utilities emphasized that the Boston Terminal charges were the vital problem of the Old Colony situation.[7] This same position was taken by the Commonwealth and by its Special Railroad Commission in a joint brief filed with the Interstate Commerce Commission on September 30, 1940, and by the Commonwealth in its brief filed with the District Court in May, 1941.

Finally, in a joint petition in December, 1942, the Commonwealth and the Special Railroad Commission, in seeking a modification of the Third Supplemental Report and Order of the Commission, requested the Commission to modify its order to provide that, if the option should be exercised, the transit district created by the Commonwealth may "step into the shoes of the New Haven under the Boston Terminal Company contracts *as modified* by the plan so far as concerns the use of the terminal and Old Colony business and payment therefor to the Old Colony" (italics supplied). These actions of the Commonwealth and of the Special Railroad Commission indicate that the concern over the Interstate Commerce Commission's action being an encroachment upon the Commonwealth's police power is of recent origin, and inconsistent with the protection of the public welfare which the Commonwealth previously sought to accomplish by supporting provisions of the

[7] I. C. C. Transcript, pp. 3402-3693.

plan which would insure continued passenger service through reduction of the Terminal charges.

B. Federal Power over the Bankruptcy of Interstate Carriers is Superior to State Police Powers.

One purpose in designating the Interstate Commerce Commission as the administrative body charged with the formulation of plans of reorganization was to make certain that such plans would treat carriers as a whole, regardless of state boundaries. To make such plans subject to the veto of the legislatures of the several states through which the railroads in question run would seriously endanger this statutory purpose. The Congress, when it enacted Section 77, must be deemed to have been exercising both its bankruptcy and its interstate commerce powers. In so far as statutes of, and charters granted by, the Commonwealth of Massachusetts purport to require interstate railroads to make use of certain facilities or to afford a specified service, they invade the field of interstate commerce, and, in so far as they require payments to be made for the use of private property, they have entered the field which is subject to the federal bankruptcy power. Therefore, whether or not the statute and the charter in question constitute an exercise of the police power, their provisions with respect to these matters come within the ambit of Section 77 and must be superseded by the provisions of a duly approved plan. Such clearly is the effect of this Court's decision in *Palmer* v. *Massachusetts*,[8] where, although it was held that a single judge was without authority to order the discontinuance of service at 88 stations, the opinion of this Court shows that such a result can be accomplished, pursuant to Section 77, by the district court "brigaded with the administrative

[8] 308 U. S. 79 (1939).

process of the Commission", for the denial of such power was limited by the phrase "except as part of a complete plan of reorganization for an insolvent road". In this connection this Court, to clarify its meaning, quoted subsection (f) of Section 77, thereby making it clear beyond doubt or question that a complete plan of reorganization is to be free from unreasonable burdens and requirements of local law. The proposed modification of the service and monetary obligations imposed by the Boston Terminal Company Act constitutes an adoption of the principle thus expressed by this Court.

This expression of opinion is in accord with this Court's holding in *Atchison Railway* v. *Railroad Commission.*[9] That case held that the California Railroad Commission could compel the construction of a union terminal in the City of Los Angeles but only after a proper certificate of necessity had been issued by the Interstate Commerce Commission.[10] This express limitation shows clearly that the exercise of state police power is not unfettered but is subject to appropriate exercise of federal power "in a field wherein the constitution and acts of Congress passed under its authority are declared by the constitution to be the supreme law of the land." Moreover, in delineating the extent of the state's power to regulate matters affecting interstate carriers this Court said:[11]

> "But the power to regulate is not unlimited. 'It may not unnecessarily or arbitrarily trammel or interfere with the operation and conduct of railroad properties and business.' * * * The question in each case is whether, in the light of the facts disclosed, the regulation is essentially an unreasonable one. * * * And

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[9] 283 U. S. 380 (1931).

[10] See *Railroad Commission* v. *Southern Pacific Ry.*, 264 U. S. 331 (1924).

[11] 283 U. S. 380, at p. 395.

> 'the matter of expense is an important criterion to be taken into view in determining the reasonableness of the order.' "

In the instant case the Commission has expressly found that the expense in connection with the use of the Boston Terminal is excessive.[12]

A holding perhaps even more directly in point is to be found in this Court's decision in *Texas* v. *United States.*[13] Speaking for the Court in that case, Mr. Chief Justice Hughes said:[14]

> "The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce. As we said in *Colorado* v. *United States,* 271 U. S. 153, 163: 'Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce.' Even explicit charter provisions must yield to the paramount regulatory power of the Congress. * * * Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, 'efficiently to render transportation services in interstate commerce.' * * * In the present case, the findings of the Commission, setting forth undisputed facts, leave no doubt that the provision of the lease permitting the abandonment, or removal from the State, of general offices and shops of the lessor has direct relation to economy and efficiency in interstate operations and to the

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[12] C. C. A. Ex. 8, p. 9785.

[13] 292 U. S. 522 (1934).

[14] 292 U. S. 522, at p. 531.

achievement of the purpose which the Congress had in view in its grant of authority."

A similar result was reached by the district court in approving a plan of reorganization for the *Missouri Pacific Railroad Company*.[15]

In application of the same general principle it is well established that the Interstate Commerce Commission under its rate-making powers may set aside intrastate rates created by state authorities when such intrastate rates constitute a burden upon interstate commerce. *New York* v. *United States*.[16]

The exercise of the State's police power is no more sacrosanct than is the exercise of the State's tax powers and with respect to the latter this Court has established the principle that the State law must yield to the requirements of bankruptcy administration. *New York* v. *Irving Trust Company*;[17] *Van Huffel* v. *Harkelrode*[18].

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[15] 39 F. Supp. 436, at p. 448 (District Court, Eastern Dist. of Mo. (1941)). The plan there contemplated the consolidation of the principal lines of the Missouri Pacific with the so-called Gulf Coast lines lying in the State of Texas and maintenance of the general offices of the consolidated system at St. Louis, Missouri. In approving this provision of the plan the district court said:

> "The Court is therefore of the opinion that notwithstanding certain statutes of the State of Texas, Vernon's Ann. Civ. St. Tex. art. 6260 et seq., providing that no railroad corporation except one chartered under the laws of the State of Texas shall be authorized to operate in that State, and requiring the maintenance of general offices there, this Court in the carrying out of the plan, is vested with authority to direct the acquisition and operation of the properties of the so-called Gulf Coast Lines by a corporation to be organized under the laws of such foreign State as the Court may approve, and with principal offices and officers situated in the City of St. Louis. Inconsistent State laws must give way to consolidations effected under authority of the commerce or bankruptcy powers of the federal constitution."

[16] 257 U. S. 591 (1922).

[17] 288 U. S. 329 (1933).

[18] 284 U. S. 225 (1931).

In *New York* v. *Irving Trust Company* this Court held that the district court's order limiting the time for filing claims applied to tax claims with the same force as to all other claims and stated:[19]

> "The federal government possesses supreme power in respect of bankruptcies. International Shoe Co. *v.* Pinkus, 278 U. S. 261, 265, 73 L. ed. 318, 320, 49 S. Ct. 108. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

These principles are applicable to the contentions of the Commonwealth and of the City of Boston, as well as those of the Terminal interests, directed against those provisions of the plan that protect the reorganized road from undue losses arising from local passenger service.

POINT III.

The refusal of the Commission to reopen the proceedings to receive additional evidence as to the value of the Boston Terminal facilities and the refusal of the District Court to receive the evidence which might have been presented to the Commission are in accord with rules well established by the holdings of this Court.

No claim is made by petitioners that the conclusions of the Commission with respect to the Boston Terminal are not supported by any evidence. They claim rather that the Commission did not have before it all of the evidence which

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[19] 288 U. S. 329, 333 (1933).

might have been presented upon this subject. In this connection they also claim that they have been denied an opportunity for a hearing.

No special claim is made in this respect by the Commonwealth or the City of Boston, both of which actively participated in substantially every phase of the proceeding, and clearly have no standing to join in these particular objections of the other petitioners.

As pointed out above, the proceedings for the reorganization of the New Haven were instituted in October, 1935. On June 1, 1937, the first plan of reorganization was filed and hearings on due notice were commenced in July of that year. In December, 1941, when the principal issue involved related to a reduction of the burdens incident to the operation of the East End properties, the District Court filed an opinion specifically including a recommendation for the reduction of the Boston Terminal charges. In February of 1942 hearings were held before the Commission at which the East End problems, including the problem of the charges for use of the Boston Terminal facilities, were specifically considered and evidence with respect to the value of those facilities was introduced. Thereafter in October, 1942, the Commission entered its Third Supplemental Report and Order approving a plan of reorganization which embodied provisions for reduction of the Terminal charges and the right to terminate use of the facilities. Then, and only then, by petitions filed with the Commission in November and December, did the Boston Terminal parties make any effort to present evidence to the Commission.

The petitions, particularly that of the Institutional Group for Boston Terminal Bonds, seek to create an impression of surprise that the Commission should have altered the obligations of the Debtor with respect to the

Boston Terminal. The possibility of surprise, however, is negatived by the history of the consideration given to the problems created by the Boston Terminal.

The District Court as far back as 1938 was so impressed with the importance of getting light on these problems, that it appointed a Committee of Experts to make an extensive examination and report. The District Court's order included a provision[1] directing the Committee to make "further studies of operating expenses and other costs of passenger facilities in Boston." After a comprehensive study of the problem the Committee filed its Report dated February 17, 1939. Since that time the possibility of a reduction of Boston Terminal charges has been brought forward or proposed in brief and argument by at least eleven parties.[2] Such proposals were made at every opportunity.

The need and possibilities of reduction in the Boston Terminal charges were considered in the Commission's original report of March 22, 1940[3] and again in its First Supplemental Report[4] when, in directing the acquisition of Old Colony and the Boston & Providence as part of the reorganization of the principal Debtor, the Commission expressly recognized both the burdensome character of the Boston Terminal and the possibility of an ultimate reduction in Boston Terminal charges.

After the December, 1941, opinion of the District Court, extensive additions were made to the record before the Commission in respect to the Boston Terminal problem as

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[1] R. p. 5005, Order No. 320.

[2] Old Colony Railroad Company, Commonwealth of Massachusetts, Special Railroad Commission of Massachusetts, Old Colony Commuters League, N. Y., N. H. & H. R. R. Co., Debtor, Boston & Albany R. R. Co., Old Colony Shareholders Committee, City of Boston, Boston & Providence Railroad Corp., Insurance Group, Mutual Savings Bank Group.

[3] R. p. 7863.

[4] R. p. 8037.

appears from the transcript of testimony offered at the February 1942 hearings[5] and from the Commission's Supplemental Reports.[6] The Commission, which is charged with responsibility for matters of valuation, having knowledge of the record before it and of the general nature of the proof offered, refused to reopen the hearings and dismissed the Boston Terminal Groups' petitions dated November 30, 1942 and December 4, 1942.

The foregoing shows that the Boston Terminal problem arose long prior to the Third Supplemental Report and had ample consideration both in the administrative and judicial proceedings relating to the New Haven reorganization. Nor can there be doubt that the Boston Terminal interests had adequate actual and constructive notice that such a program would be given consideration. That their company went into bankruptcy as a result of the orders upheld in *Palmer* v. *Webster & Atlas Bank*,[7] should alone be sufficent to charge them with such notice.

The sequence of the events which conclusively settle the question of notice to the Boston Terminal interests is as follows:

(1) The Boston Terminal was found by the District Court to be a creditor of the New Haven[8] and, as such, it received the same notice of the pendency of the proceeding and of hearings held therein as all other creditors.

(2) On October 19, 1939, the New Haven Trustees filed a petition seeking relief from further payment on account of the Boston Terminal bond interest and taxes. The Trustee of the Boston Terminal First Mortgage *intervened* specially in *opposition* to the petition. On October

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[5] I. C. C. Transcript 3828-30, 3832-35, 3896-98.
[6] C. C. A. Ex. 8, p. 9784.
[7] 312 U. S. 156 (1941).
[8] R. p. 6169.

30, 1939, the District Court entered an order directing the New Haven Trustees to discontinue such payments and that order was finally affirmed by this Court.[9]

(3) A petition for reorganization of the Boston Terminal was filed November 3, 1939, by certain of the insurance companies constituting the petitioners, Institutional Group for Boston Terminal Bonds.

(4) The Boston Terminal Company itself intervened in the New Haven reorganization proceedings before the Commission on December 7, 1939.

(5) The trustee of the Boston Terminal was duly qualified on March 7, 1940.

(6) Hearings on the plan first certified by the Commission were commenced before the District Court on June 3, 1941, at which hearings the District Court appointed the Compromise Committee.

(7) The opinion of the District Judge disapproving the plan in which he specifically called attention to the need for readjustment of obligations to the Boston Terminal was entered on December 8, 1941.

(8) On January 27, 1942, the Commission ordered publication of notices in the cities of New Haven, Hartford, Boston, Providence and New York of a hearing, to be held on February 17, 1942, for the purpose of receiving "such evidence as may be relevant and material in light of the recent decision of the District Court of the United States of the District of Connecticut • • • disapproving the plan of reorganization approved by the Commission • • • or otherwise to supplement the record before the Commission • • •".

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[9] *Palmer* v. *Webster & Atlas Bank*, 312 U. S. 156 (1941).

(9) Pursuant to notice of the Commission, hearings were held on February 17-20, 1942, inclusive, at which additional evidence relating to the Boston Terminal problem was introduced. The Boston Terminal interests neither appeared nor offered any evidence.

On the record in this case the contention of petitioners that there was a denial of due process for failure to give notice of the proceedings is clearly without merit and presents no new question to this Court. A similar contention was rejected by this Court in its opinion in *Market Street Railway Company* v. *Railroad Commission of California*, decided March 26, 1945 (Nos. 510 and 511, October Term 1944), where this Court said:

> "The Company particularly complains that it had no notice that the Commission was receiving evidence of its offer to sell its properties for $7,950,000 for use as a rate base. The offer was received in evidence without limitation or statement of its purpose. Nothing appears to mislead or entrap the Company or to lull it into a sense of security. It seems simply to have assumed that no explanation of the offer was necessary. Doubtless the decision and the grounds of decision were unexpected. But *surprise is not necessarily want of due process.*
>
> We find that the Company had reasonable notice that its rates were under attack and was not denied opportunity to be heard thereon. We can well understand how counsel's attention became diverted to more sharply contested aspects of the case. But even if a more convincing showing were made that the Company had relevant evidence to be heard, we find no adequate excuse for the failure to offer it in the proceeding. No offer was rejected, no request for time to obtain such evidence was denied. *A misapprehension by a litigant of the steps which its best interests require* during a trial may be appealing

grounds for a plea to the discretion of the hearing tribunal for another chance, but it *is not grounds for our interference as a denial of constitutional rights.*" (Italics supplied.)

In the light of the sequence of events in the instant case the Commission was fully justified in refusing to reopen the proceedings when to have done so would have prejudiced the rights of the parties who had diligently borne the burden of the proceeding and who were desirous of proceeding with the reorganization without further unnecessary expense and delay. That the Commission is vested with full discretion in this regard is clearly established by the holding of this Court in *Interstate Commerce Commission* v. *Jersey City.*[10]

Petitioners also assert that the District Court erred in refusing to admit evidence with respect to the terminal facilities which might have been adduced before the Commission. The opinion of this Court in the *Western Pacific* case places upon the Commission the responsibility for determining the valuation of carrier properties. The duty of the District Court is to ascertain whether the Commission in arriving at its valuation has followed statutory standards. Since the evidence offered related solely to value and not to compliance with statutory standards, the ruling of the District Court excluding such evidence was in full accord with the holdings of this Court.

No creditor is entitled to stand by and await the outcome of litigation and then upon an unfavorable decision invoke the doctrine of due process as a means of reopening the case and litigating *de novo* the issue which meanwhile has been decided. No further ruling by this Court is needed to dispose of such an issue as this.

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[10] 322 U. S. 503 (1944).

POINT IV.

The rights of Petitioners were not adversely affected by the procedure adopted by the Commission in entering its Fifth Supplemental Report and Order, and such procedure was in compliance with statutory requirements.

A. Petitioners were not adversely affected by the procedure complained of.

Extensive objections were filed by the Boston Terminal interests to the plan of reorganization embodied in the Commission's Fourth Supplemental Report and Order. These objections were argued at length, together with other objections to the plan, at hearings before the District Court which lasted for three full days. The opinion of the District Court with respect to the Commission's Fourth Supplemental Report and Order suggested no change in the provisions of the plan relating to the Boston Terminal but merely construed those provisions as being an offer which the Boston Terminal might accept or reject. In its Fifth Supplemental Report and Order, which was entered on the basis of the record already made and without further hearing, the Commission clarified the provisions of the plan relating to the Boston Terminal by including an express provision for the Boston Terminal to elect whether to exclude the reorganized New Haven from use of the Terminal properties or to accept the terms proposed in the plan, and added a provision authorizing deletion of the provisions with respect to the Boston Terminal, should such provisions be held illegal by any appellate court.

Neither of these provisions adversely affected the rights of the Boston Terminal interests. The first merely clarifies their right of election and the second, if called into opera-

tion, would leave them with the same rights against the New Haven they would have had if no provision with respect to the Boston Terminal had been included in the plan. As to the latter, the District Court aptly said "That they [the Terminal interests] should complain, first, against any modification of their rights and, then, against the prompt deletion of the provisions purporting to accomplish such modifications is indeed anomalous."[1]

Likewise with respect to the plan provisions relating to the furnishing of local passenger service on the Old Colony, the only changes made in the Commission's Fifth Supplemental Report were four made pursuant to clarifications or interpretations of the District Court. Of these four changes, three were made to meet the suggestions or objections of the Commonwealth and the fourth was a clarification made at the request of the Trustees of the principal Debtor, which did not modify the plan provisions but was adopted solely for purposes of clarity. It is plain that the Commonwealth was not in any way adversely affected by the Fifth Supplemental Report.

B. The procedure complies with the requirements of Section 77.

Section 77 contains no express bar to a further supplemental report and order upon the basis of evidence already before the Commission, subsequent to certification of a plan to the court. The petitioners attempt, however, to spell out such a statutory bar by implication. The pertinent provision of Section 77(d) provides that after its report and order has been rendered the Commission may,

> "* * * upon petition for good cause shown filed within sixty days of the date of its order, and upon further hearings if the Commission shall deem neces-

[1] *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 631, 637.

> sary, in a supplemental report and order modify any plan which it has approved, stating the reasons for such modification. The Commission, if it approves a plan, shall thereupon certify the plan to the court together with a transcript of the proceedings before it and a copy of the report and order approving the plan. No plan shall be approved or confirmed by the judge in any proceeding under this section unless the plan shall first have been approved by the Commission and certified to the court."

There is nothing in this provision forbidding the Commission to enter a supplemental report and order subsequent to a report and order previously certified to the court and, at the time, under consideration by the court. On the contrary, the language contemplates supplemental reports and orders by the Commission modifying plans previously approved. It imposes a time limit only upon the rights of the parties to file petitions for such modifications.

As a practical matter, a supplemental report and order, based upon the evidence already before the Commission, when the plan is pending before the district court, enables the Commission to rectify errors or omissions in its previously certified report and order, particularly where the error or omission is one of law and requires no further determination of fact. In the absence of such remedial procedure mere inadvertence on the part of the Commission might compel the court to return the proceeding to the Commission for another hearing with more repetitious testimony and delay.

The fact that further evidence was not received by the Commission prior to issuance of its Fifth Supplemental Report and Order in this case cannot be a cause for complaint since the provision above quoted makes it clear that

even when parties have petitioned for modification the Commission may issue supplemental reports either with or without further hearing.

No party is prejudiced by the absence of a hearing for in such a case the further report and order must necessarily be based upon evidence already before the Commission and thus can contain only provisions which could have appeared in the prior report and order. The parties may file with the court their objections to the provisions of the further supplemental order and their claims for equitable treatment, and they may be heard thereon as was done in the instant case. After the entry of an order by the court upon the plan as modified, the parties have a right of appeal therefrom as effective in their protection as though no further supplemental report and order had been certified to the court.

As was pointed out by the Circuit Court of Appeals, the Commission has not doubted its powers to render on its own motion a supplemental report modifying a plan previously certified to the court.[2] This practice adopted by the Commission gives recognition to the essential nature of a reorganization proceeding under Section 77, which is in the last analysis a substantive and not a procedural law. A proceeding under this statute is a continuing process in the evolution of a plan of reorganization. Throughout this process it is the duty of the Commission to be ever vigilant in its effort to perfect the plan. The Commission's practice of correcting or amending plans prior to formal approval or disapproval by the court is a necessary and reasonable incident to the full performance of the duties imposed upon it. *A fortiori* such action

[2] *Chicago, Great Western Railroad Company Reorganization,* 233 I. C. C. 63; *Chicago Rock Island & Pacific Railway Company Reorganization,* 249 I. C. C. 297.

is proper after the Commission has had the benefit of the court's comments on the plan before entry of a court order.

It was strongly urged upon the Circuit Court of Appeals that Section 77(e) requires the District Court either to approve the plan or to dismiss the proceedings or to refer them back to the Commission. In dismissing that contention, the Court below said:

> "We do not think that the statute compels a procedure so inelastic. * * * The fact that the court wrote an opinion inviting the filing of a fifth supplemental report and suggesting certain corrections in the plan of the fourth report certainly did not deprive the Commission of its statutory power under subdivision (d) to improve the plan by a supplementary report. We regard it as a commendable instance of 'properly coordinated action' between the court and the Commission, the importance of which was noted in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 475."[2a]

The District Court's action in upholding the plan certified to it by the Commission, but suggesting corrections concurred in by the Commission in its Fifth Supplemental Report and Order, is the kind of cooperation which this Court has repeatedly recommended for proceedings under Section 77. This Court has expressly directed that such proceedings be carried forward as expeditiously as possible and the language it has repeatedly used in commenting on Section 77 seems clearly to indicate a belief that administration of proceedings under the statute requires cooperation between court and Commission of the character demonstrated in this case.

In *Continental Bank* v. *Rock Island Ry.*, this Court spoke of the importance of eliminating delay and expense

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[2a] 147 F. 2d, pp. 44-45.

in reorganizations and said that "to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted."[3]

Much emphasis has been placed on the need for cooperation between the court and the Commission to achieve the statutory objective. In *Palmer* v. *Massachusetts,* the following was said:

> "The judicial process in bankruptcy proceedings under §77 is, as it were, brigaded with the administrative process of the Commission."[4]

Again in *Warren* v. *Palmer,* in slightly different words the same thought was expressed:

> "The judicial functions of the bankruptcy court and the administrative functions of the Commission work cooperatively in reorganizations."[5]

In the *Western Pacific* case, cooperation was stressed again:

> "These reorganizations may be attained only through properly coordinated action between the Commission and the court."[6]

In the present case "properly coordinated action" was taken before the decree approving the plan was entered. Thus, the statute as interpreted by this Court was given full effect.

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[3] 294 U. S. 648, at p. 685.
[4] 308 U. S. 79, at p. 87.
[5] 310 U. S. 132, at p. 138.
[6] 318 U. S. 448, at p. 475.

POINT V.

There is no ground for granting the petitions.

Paragraph 5 of Supreme Court Rule 38 states that a review on writ of certiorari will be granted only when there are special and important reasons therefor. No such reasons have been shown to exist in this case despite the multitude of alleged "questions" set forth by the petitioners.

In 1939 the aspect of the plan relating to the reorganized company's obligation to render local passenger service was presented to this Court in *Palmer* v. *Massachusetts*.[1] In its opinion this Court pointed out that such economies could be effected only "as a part of a complete plan of reorganization." Since that time the development of the plan has been guided by the view so expressed.

Development of the plan of reorganization for the New Haven has taken over nine and one-half years to date. This plan deals with total claims against the New Haven proper aggregating approximately $365,000,000, exclusive of the stock equity interests in the property. Substantially all creditors of the New Haven have been called upon to make sacrifices and the preferred and common stock interests have been eliminated. In addition to claims against the New Haven proper, the plan provides for the acquisition of the properties of the Old Colony and those of the Boston & Providence by the reorganized company. The security holders of these roads must likewise make substantial sacrifices and the equity of the Old Colony will be eliminated.

The holders of the outstanding bonds of the Boston Terminal Company, aggregating $15,500,000 principal

[1] 308 U. S. 79 (1939).

amount, maintain that they should not be called upon to make any sacrifices in connection with the reorganization. They base their position upon the ground that the Debtor's obligation with respect to the Boston Terminal bonds is statutory rather than contractual. We submit that no distinction can be made in bankruptcy administration between a contractual obligation and a statutory obligation of the type here involved in effecting a plan of reorganization under Section 77. Certainly in view of the sacrifices called for by other creditors of the New Haven there can be no equity in their claim for immunity. Granting certiorari would serve no useful purpose in this reorganization but would cause further expense and delay.

Conclusion.

The petitions for certiorari should be denied.

June 12, 1945.

Respectfully submitted,

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